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In the Supreme Court of the United States

OCTOBER TERM, 1984

HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL., PETITIONERS,

v.

ANNE W. WALKER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The House of Representatives vested its Subcommittee on Services with the delegated authority to operate a House Restaurant System. After consideration of the matter in executive session, the subcommittee dismissed a committee aide who had served as General Manager of the Restaurant System. The questions presented are:

1. Does the Speech or Debate Clause foreclose judicial questioning of the subcommittee's decision in a civil suit brought by the dismissed aide?

2. Does a determination by a court that a Congressional committee's deliberative activity related to "mundane" matters obviate the protections afforded by the Speech or Debate Clause?

3. Do the doctrines of absolute and qualified official immunity require dismissal of a claim for monetary damages against the Chairman and Staff Director of the Subcommittee?

PARTIES INVOLVED

The parties to this Petition are the Honorable Ed Jones, Chairman of the Subcommittee on Services, Committee on House Administration, and Thomas Marshall, the subcommittee's former staff director, Petitioners, and Anne W. Walker, Respondent.

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HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL., PETITIONERS,

v.

ANNE W. WALKER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the Chairman and the former staff director of a Subcommittee of the United States House of Representatives, through the General Counsel to the Clerk of the United States House of Representatives, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 1, 1984, in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals is reported at 733 F. 2d 923 (D.C. Cir. 1984). The opinion of the district court is reported at 557 F. Supp. 366 (D.D.C. 1983). Both decisions are attached as appendices.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1984. That court denied a petition for rehearing with a suggestion for rehearing *en banc* on July 5, 1984.

This petition was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1 of the Constitution provides in pertinent part "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

Article I, Section 5, Clause 2 provides that "Each House may determine the Rules of its Proceedings."

Article I, Section 2, Clause 5 states that the "House of Representatives shall chuse their Speaker and other Officers."

STATEMENT OF THE CASE

This case involves a suit alleging discriminatory discharge brought by a former manager of the House Restaurant System against the Chairman of the subcommittee responsible for the management of the House's restaurants, and against the subcommittee's Staff Director.

To facilitate the conduct of its mission as a component part of the nation's legislature, the United States House of Representatives has, since the early nineteenth century,[1] determined it to be necessary to provide food service facilities within the Capitol and the House Office Buildings for Members, employees, and others having business with the Congress.[2] To implement this policy decision

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[1] *See* V A. Hinds, *Precedents of the House of Representatives* § 7244, at 1090 n.3 (1907) (noting facility in the crypt of the Capitol before 1828). The early Capitol included a "refectory [dining room], for the use of Members of Congress during the session." R. Mills, *Guide to the Capitol of the United States* 63–64 (1834). Those early facilities apparently operated informally. A formal House dining room appears to date to 1863. *See Page v. District of Columbia*, 20 App. D.C. 469, 475 (1902) (noting that "[t]hese restaurants have been in use and operation for near a half century.").

[2] As Congressman Hoffman explained in 1954, in justifying a resolution, H. Res. 692, 83d Cong., 2d Sess., under which the House required a survey of the food service facilities:

Continued

and attend to other administrative matters, the House has elected a number of Members of that body to constitute a Standing Committee on House Administration.[3] Among the matters placed under this Committee's jurisdiction are all bills, resolutions, and other matters relating to the employment of persons by the House, the accounts of the House, and the provision of services to the House, including the House Restaurant. The committee,

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> "Few people realize that meeting at 12 noon, as the House usually does, and continuing in session until late in the afternoon and sometimes late in the evening, Members of the House have no place where they can conveniently obtain either a lunch or a meal other than in the Capitol Building."

100 Cong. Rec. 12842 (1954).

[3] Historically, the House has sought to supervise dining facilities through a variety of means. In the 1860's the Speaker supervised the Capitol dining room. Cong., Globe, 40th Cong., 2d Sess. 27 (1867). There ensued a period of committee control. For example, in 1869 jurisdiction was transferred from the Committee on Revisal and Unfinished Business to the Committee on Public Buildings and Grounds. Cong. Globe, 41st Cong., 1st Sess. 644 (1869). By 1904, the House had provided by resolution that "the privilege of conducting said luncheon rooms shall be granted by the Speaker of the House to such person or persons as he shall select, who shall be subject to removal by him. . . ." 38 Cong. Rec. 5581 (1904).

In 1921, control over the facility passed to the Committee on Accounts. 61 Cong. Rec. 2034. For a time the restaurants were operated by the Architect of the Capitol under the supervision of predecessors of the current subcommittees. H. Res. 590, 76th Cong., 2d Sess., 86 Cong. Rec. 11552 (1940) and Pub. L. No. 76-812, codified at 40 U.S.C. § 174k (1952).

At various times in recent history the House has legislated Special, Select, and Ad Hoc Committees or subcommittees to assist in the management of these facilities. *See* H. Res. 472, 91st Cong., 1st Sess., 115 Cong. Rec. 19080-81 (1969); H. Res. 317, 92d Cong., 1st Sess., 117 Cong. Rec. 7961 (1971); H. Res. 111, 93d Cong., 1st Sess., 119 Cong. Rec. 3680 (1973).

Defendant Chairman Jones, and the subcommittee he chairs, are simply the latest in a long series of collegial devices the House has used to provide for and manage this particular internal necessity. During its history, the House Restaurant System has been the subject of numerous legislative actions—"investigations, reports, and resolutions." 733 F.2d at 939 (MacKinnon, J., dissenting); App. A at 32a.

has, in turn, created a number of subcommittees, including the Subcommittee on Services, which is vested with jurisdiction over matters pertaining to House services including the operation of restaurant facilities.

In the spring of 1982 that subcommittee, acting pursuant to the authority delegated to it by the House and the full committee, determined to dismiss one of its employees, Anne W. Walker, who served as its General Manager of the House Restaurant System. Several months later, Walker filed suit in the United States District Court for the District of Columbia against the Chairman, Congressman Ed Jones; two additional Members of the Subcommittee, Congressman Robert Mollohan and Congressman James Coyne; and, Thomas Marshall, the staff director of the Subcommittee. The complaint alleged that Walker was unconstitutionally discharged from her position as General Manager for gender-based reasons in violation of the Fifth Amendment.[4]

Specifically, the complaint, seeking declaratory and injunctive relief, reinstatement and damages, alleged that Walker was terminated on June 22, 1982, by letter from Chairman Jones as "best for the future of the Restaurant System." Complaint ¶ 16, App. D at 6d.

The critical aspect of the complaint, describing the subcommittee's dismissal decision, states:

> Defendants Mollohan and Coyne, together with Defendant Jones, constituted and now constitute a majority of the Subcommittee on Services of the House Committee on Administration, and, as such, were and are able to control the acts, practices, and functions of the Subcommittee including the wrongful discharge of Plaintiff.

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[4] The complaint alleges that "the position of General Manager . . . formerly occupied by plaintiff was filled by Defendants Jones and Marshall with a male person." Complaint ¶ 18, App. D at 7d. It is also alleged that Chairman Jones "indicated to others that because of plaintiff's sex she was overpaid and that her salary was 'ridiculous for a woman' " and that Staff Director Marshall "repeated" such statement to "staff members." *ID.*, ¶ 13, App. D at 6d.

> Defendants Mollohan and Coyne relinquished their authority to participate in the hiring and firing practices of the Subcommittee, including specifically such authority as it related to Plaintiff, and delegated such authority to Defendants Jones and Marshall with knowledge that Defendants Jones and Marshall intended to discharge Plaintiff. Defendants subsequently refused to take action to revoke or nullify the wrongful discharge of Plaintiff.
>
> The discharge of Plaintiff and the refusal to revoke or nullify such discharge occurred despite the objections of the other members of the Subcommittee not named as defendants herein.

¶ 17, App. D at 7d.[5]

PROCEEDINGS IN THE DISTRICT COURT

The defendants moved to dismiss the complaint based on the application of the Speech or Debate Clause, the doctrines of absolute and qualified official immunity and on plaintiff's failure to state a claim for which relief could be granted. The District Court dismissed the complaint in its entirety. It relied on precedent within the District of Columbia Circuit establishing that "the internal administration of Congress ha[s] been found to be protected legislative act[ivity;] [f]or example, the seating of the

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[5] Additionally, the complaint alleges that Chairman Jones "made public statements and representations, contrary to fact, that plaintiff's discharge was based on the operation of the [Restaurant] System inefficiently and at a loss," Complaint at ¶ 19, App. D at 7d, and that Chairman Jones made untrue allegations that Walker "was guilty of improper and/or illegal bookkeeping practices and had engaged in misappropriation and 'skimming' of funds from the System." *Id.*

In succeeding counts, the Complaint avers that Walker's discharge was "arbitrary, capricious, and unlawful," Complaint ¶ 25, App. D at 8d, deprived her of a substantial personal and property rights as well as due process and equal protection, ¶ 28, App. D at 9d; was without cause or notice and without providing any opportunity for Walker to be heard in violation of the Fifth Amendment, ¶ 32, App. D at 10d; was without valid cause, ¶ 35, App. D at 10d; violated her constitutionally protected interest; and that the defendant had engaged in a conspiracy to wrongfully discharged the plaintiff, ¶ 39, App. D at 11d.

press in the House and Senate galleries . . . have been found to be legislative action protected by the Speech and Debate Clause." *Walker v. Jones,* 557 F. Supp. 366, 367 (1983), App. B at 3b, *citing Consumers Union of the United States Inc. v. Periodical Correspondents Ass'n,* 515 F.2d 1341, 1350 (D.C. Cir. 1975 *cert. denied,* 423 U.S. 1051 (1976)). Furthermore, the District Court concluded that the "discharge of a House Restaurant employee, pursuant to authority granted by a congressional Subcommittee, is an action within the 'legislative sphere' [ ] [u]nder the Speech or Debate Clause of the United States Constitution [and], therefore, the Chairman, Members, and staff of the Subcommittee may not be held liable for Walker's discharge." 557 F. Supp. at 368. App. B at 3b.

DECISION OF THE COURT OF APPEALS

The plaintiff appealed from the dismissal decision and the District of Columbia Circuit, by a split panel decision, reversed the dismissal as to Chairman Jones and the Staff Director and affirmed as to the dismissal of the two other Members of the Subcommittee. The majority recognized that it was deciding "an unsettled issue relating to the Constitution's command that 'for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place.' " 733 F.2d at 925; App. A at 2a. The panel majority held that "[t]he Speech or Debate Clause . . . does not impregnably shield from court consideration allegedly unconstitutional personnel actions taken in the course of managing" internal House facilities. *Id.* The Court reasoned that the judiciary may review legislative activity which a Court deems to be related to "mundane fields," *id.* at 929, App. A at 10a, or which do not constitute " 'matters' of state," *ID.* at 926. App. A at 4a.

The Court declined to apply the doctrine of absolute official immunity afforded the President by this Court in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), to a Member of Congress, holding that "[l]ower courts are not positioned to entertain such argument." 733 F.2d at 932; App. A at

17a. While it held that the doctrine of qualified official immunity, *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), was applicable, it held that the conduct complained of—dismissal of legislative employees—allegedly violated a clearly established constitutional right and that there was, therefore, no justification for dismissing the action on qualified immunity grounds.[6] 733 F.2d at 923; App. A at 17a-18a.

Petitioners sought rehearing with a suggestion for rehearing *en banc.* The panel, again on a two-to-one vote, declined to rehear the matter and the *en banc* Court, after a majority of judges' in regular service had not voted in favor of Petitioners Suggestion for Rehearing *En Banc,* denied the Suggestion. Orders of July 5, 1984; App. C.

The Court of Appeals, upon Petitioners' motion, did stay the mandate pending this application for certiorari. Order of July 20, 1984.

REASONS FOR GRANTING THE WRIT

A. THIS CASE SQUARELY PRESENTS THE IMPORTANT QUESTION OF THE RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES RESERVED BY THE COURT *DAVIS V. PASSMAN.*

This case presents the question reserved five years ago by *Davis v. Passman,* 442 U.S. 228, 235 n.11 (1979): whether Congressional decisions to dismiss senior aides are shielded by the Speech or Debate Clause. The Court should now grant certiorari to resolve that issue.

In *Davis v. Passman* itself, this Court indicated the importance of resolving that issue. The Court granted certiorari in *Davis v. Passman* to review a similar case brought by a dismissed Congressional aide alleging gender-based discrimination. However, this Court resolved only whether a cause of action for discrimination could be inferred from the Fifth Amendment. At the time, this Court refrained from deciding the applicability of the Speech or

[6] The District Court had not reached the official immunity questions.

Debate Clause, noting that "[t]he en banc Court of Appeals did not decide whether the conduct of respondent [Congressman Passman] was shielded by the Speech or Debate Clause. In the absence of such a decision, we also intimate no view on this question." *Id.* at 235–236 n.11[7] This case presents no such barrier. The court below squarely, although by a divided panel, decided that question.[8]

Moreover, while the majority in *Davis v. Passman* did not intimate any view of the question, four members of the Court did. Justice Stewart, joined by Justice Rehnquist, found the Speech or Debate claim to be "far from frivolous," *Id.* at 251 (Stewart, J., dissenting). The Chief Justice, joined by Justices Powell and Rehnquist, specifically stated that "long-accepted concepts of separation of powers dictate . . . that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed." *Id.* at 250 (Burger, C. J., dissenting). These expressed views of four Justices powerfully attest that the question merits the Court's attention.

B. THE DECISION BELOW, DENYING SPEECH OR DEBATE PROTECTION TO PERSONNEL DECISIONS DECIDES THE QUESTION IN A WAY WHICH CONFLICTS WITH DECISIONS OF THIS COURT.

The Court below decided that deliberative actions by the legislature in what it termed "mundane" matters which do not constitute "matters of state" cannot be protected by the Speech or Debate Clause. Aside from representing, in the words of the dissenting judge, "a dangerous attack upon the integrity of the Legislative branch," 733 F.2d at 938; App. A at 28a, the court of appeals com-

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[7] On remand, the case was settled without a decision on this question.

[8] As discussed below, the court of appeals attempted to divide the issue into whether the dismissed aide worked on "mundane" or "significant" matters. Even by its view, which has its own consequences expanding the impact of the ruling, it decided in significant measure the question reserved for this Court.

pletely distorted, indeed refused to apply, the test for speech or debate repeatedly set out by this Court.

The test for determining whether the Clause applies was set out in *Gravel v. United States*, 408 U.S. 606 (1972) and has since been used countless times by lower courts to establish activity within the "legitimate legislative sphere."

As set forth in *Gravel*, the Clause applies to "committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House*." 408 U.S. at 625 (emphasis added).

The court below jettisoned this test and invented and applied a novel and unprecedented criterion: whether the subject of the legislative action is in a "mundane field" (which in this case meant "[s]electing, supervising, and discharging a food facilities manager," 733 F.2d at 931; App. A at 14a) as opposed to a matter "of state." 733 F. 2d at 926; App. A at 4a.

This blatant distortion of the classic test articulated in *Gravel* is wholly unjustified and unsupported by any Supreme Court precedent. Indeed, the lower court edited the *Gravel* language and inserted therein the words "of state" to justify the departure from the law. "The majority's feeble effort to limit the *Gravel* Court's pronouncement by splicing the words 'of state' into the clause immediately following the reference to 'other matters' . . . does not succeed." 733 F.2d at 940; App. A at 34a–35a (MacKinnon, J., dissenting).[9]

Despite the fact that among the "other matters" referred to in *Gravel* which are placed by the Constitution

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[9] The second principal authority relied upon as persuasive authority by the Court of Appeals is the original panel decision in *Davis* v. *Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *rev'd*, 442 U.S. 228 (1979). The subsequent history of the Fifth Circuit's and this Court's consideration of *Davis* v. *Passman* renders that panel decision a very thin reed on which to rely for support.

"in the jurisdiction of either House" is the power to "chuse their . . . Officers," and to "determine [its] Rules",[10] U.S. Const., Art. I, secs. 2 and 5, the court of appeals found jurisdiction to review an internal legislative matter. Applying the test invented by the court below to other legislative decisions will arguably place many other matters which are "within the jurisdiction" of the House before the courts.[11] Under the D.C. Circuit's new test, all these matters may now be justiciable.

As this Court stressed repeatedly in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975), courts should not weigh Speech or Debate protection on a case-by-case basis, but must recognize that such protection is "absolute." Hitherto, whether the matter at issue was "mundane" was beside the point, just as it is beside the point whether a judge's duties are "mundane" in deciding

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[10] The history of House conduct of this activity since the early 1800's, *see* pages 2-4, *supra*, demonstrates the historic importance of a facility to allow full-time Congressional proceedings. The dissenting opinion below noted that "House debates reveal that the Restaurant has long been deemed "absolutely essential for the conduct of business of the House and for the accommodation of those who have business with the House . . . '." 733 F.2d at 939 (MacKinnon, J., dissenting) (citation omitted). App. A at 32a.

[11] The House is constitutionally empowered to: "have the sole Power of Impeachment" to remove Executive or Judicial Officials, Art. I, sec. 2, cl. 5; "be the Judge of the Elections, Returns, and Qualifications of its own Members," Art. I, sec. 5, cl. 1; "compel the Attendance of absent Members," *id;* "punish" or "expel" its "Members for disorderly Behavior," Art. I, sec. 5, cl. 2; keep and publish a "Journal of its Proceedings" except for "such Parts as may in their Judgment require Secrecy," Art. I, sec. 5, cl. 3; compel the attendance and testimony of witnesses, *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927); and punish individuals guilty of contemning the body, *Anderson* v. *Dunn*, 19 U.S. (6 Wheat) 204 (1821). The exercise of any of these plenary authorities might be considered "mundane" by a particular court. For example, would the Court of Appeals have considered a congressional investigation, an impeachment resolution, or legislation concerning improprieties by executive officials delegated authority to supervise the provision of the food services to executive agencies or the armed services to be "mundane" and, therefore, not worthy of the constitutional protections of the clause?

whether judicial immunity applies in suits against him or her. As the dissenting opinion noted, "precedents provide the majority with no support whatsoever" for its "sharp departure from existing law," and its "judgment fails to accord to the House the respect that any court owes a co-ordinate branch of government." 733 F.2d at 938; App. A at 30a (MacKinnon, J., dissenting).

This new District of Columbia Circuit test will impair much of Congressional operation, particularly since the Congress meets within this circuit. Before the House of Representatives faces extensive judicial questioning of legislative activity deemed "mundane," with a serious possibility of a clash between the Branches,[12] it is this

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[12] The specific meeting of the Subcommittee which is the subject of the complaint was conducted in executive session. It is difficult, if not impossible, to foresee how this ligitation could proceed without the parties seeking the records of that meeting. However, any attempt to obtain such records runs afoul of the House of Representatives' determination to keep portions of its proceedings secret. Rule L(50) of the House of Representatives, which controls the House's response to subpoenas of its records, provides that

> Upon such notification to the House that said subpoena is . . . consistent with the privileges and rights of the House, the Member, officer, or employee shall comply with such subpoena . . . *except that under no circumstances shall any minutes or transcripts of executive sessions,* or any evidence of witnesses in respect thereto, *be disclosed or copied.* . . .

Rule L(50) of the Rules of the House, reprinted in *Constitution, Jefferson's Manual and Rules of the House of Representatives,* H.R. Doc. No. 271, 97th Cong., 2d Sess. § 946, at 704 (1983) (Rules of the 98th Congress). (emphasis added).

A second potential friction point is the Court of Appeals' off-handed endorsement of plaintiff's claim for injunctive relief. Plaintiff has sought injunctive relief including reinstatement and back pay as well as "permanent employment as manager of the House Restaurant System until such time as she is eligible for retirement . . . and elects to retire." Complaint, Prayer for Relief, ¶ D(3); App. D at 12d. In rejecting defendants official immunity defense, the Court of Appeals noted that "In any case, qualified immunity presents no bar to Walker's claim for injunctive relief." 733 F.2d at 933 n.15; App. A at 18a.

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Court's responsibility to the Congress, as a coordinate Branch, to proclaim the rule. *United States v. Nixon,* 418 U.S. 683, 705 (1974); *Davis v. Passman,* 442 U.S. 228, 251–255 (1979) (Powell, J., dissenting).

C. THE DECISION OF THE COURT OF APPEALS DECIDES IMPORTANT QUESTIONS REGARDING OFFICIAL IMMUNITY WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court of Appeals decided important questions in brushing aside the defense of official immunity offered by the defendants. This Court has made clear that Members of Congress and their assistants can defend on grounds of official immunity just as executive officals can, separate and apart from the defense of the Speech or Debate Clause.[13] It has not yet ruled on two key questions re-

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In *Davis v. Passman,* the Chief Justice remarked that "The intimation that if Passman were still a Member of the House, a federal court could command him, on pain of contempt, to reemploy Davis represents an astonishing break with concepts of separate, coequal branches; I would categorically reject the notion that courts have any such power in relation to the Congress." 442 U.S. at 250–251 (Burger, C. J., dissenting). Yet the court of appeals, without even discussing the separation of powers implications of such an order, makes it available to the plaintiff.

This Court should grant this petition and determine whether the judiciary has jurisdiction over plaintiff's claim before an avoidable clash between the branches occurs. If the court of appeals is reversed, the question of the production of executive session material and of such an injunctive order would be obviated; if the court of appeals is affirmed, this Court's analysis is likely to be significantly more persuasive to the House as a coordinate branch of government then the current split panel decision of a lower court. This factor argues strongly in favor of the granting of the petition. A coequal Branch deserves the consideration of this Court as to the limits of its basic authority.

[13] *Doe v. McMillan,* 412 U.S. 306 (1973), concerned "the scope of congressional immunity under the Speech or Debate Clause," *Id.* at 307, "as well as the reach of official immunity in the legislative context." The Court noted that "[b]oth before and after *Barr* [v. *Matteo,* 360 U.S. 564 (1959)], official immunity has been held applicable to officials of the Legislative Branch." *Id.* at 319 n.13. By the time of *Davis v. Passman,* the availability of official immunity as a defense for Congressman Passman was settled law. 442 U.S. at 232 n.7.

garding Members and staff who necessarily act in a context of highly unsettled law.

First, the Court has not resolved the degree of official immunity—absolute or qualified—concerning dismissal of a Congressional aide. The divided panel allowed only qualified privilege. In *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), this Court recently held the President absolutely immune from civil damage liability for his participation in termination of a high official. The Court invoked its previous finding of "'an unrestricted power [in the President] to remove the most important of his subordinates,'" *Id.* at 750, *quoting Myers v. United States,* 272 U.S. 52, 134–35 (1927). It deemed absolute immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749.

Congressional Chairmen such as defendant Chairman Jones hold a "unique office" with similar traditions regarding separation of powers, and control and supervision of their high-level aides. As the Chief Justice has observed, "[i]n relation to his or her constituents, and in the performance of constitutionally defined functions, each Member of the House or Senate occupies a position in the Legislative Branch comparable to that of the President in the Executive Branch." *Davis v. Passman, supra,* 442 U.S. at 250 (Burger, C. J., dissenting). By conferring authority on each House to "chuse their . . . Officers," Art. I, sec. 2, cl. 5, the Framers provided that personnel matters would be resolved within the Congress, and for two centuries, Congress has handled its personnel matters internally.[14] Like the President's participation in the termina-

[14] Plaintiff, as a senior aide supervising a major internal facility, carries out responsibilities akin to those of officers elected by the House. It had long ago been judicially observed that "[t]hese restaurants are, by the rules to which we have referred, placed under the control and regulation of the respective committees of the Houses of Congress, and are conducted primarily for the use and convenience of members; and defendants, the keepers of the restaurants are *quasi*

Continued

tion of executive employee Fitzgerald, Congressional removal of a senior aide is a "matter[] 'committed by law to [Congress's] control or supervision," 457 U.S. at 755, *quoting Spalding v. Vilas,* 161 U.S. 483, 498 (1896). Allowing suits against Members by disgruntled former senior aides would engender the same ongoing friction with a coequal Branch as suits against the President.

Second, even assuming *arguendo* a qualified degree of immunity, the court of appeals adopted a novel interpretation of qualified immunity sharply reducing its importance. Just as the court below in *Davis v. Scherer,* 52 U.S.L.W 4949, 4956 (U.S. April 16, 1984), erroneously narrowed qualified immunity where there was an alleged violation of a statute or regulation, the Court of Appeals opinion narrowed the immunity where the official pled major uncertainties in the law regarding jurisdiction. While in *Harlow v. Fitzgerald,* this Court focused not only on the existence of a plaintiff's right but on whether there existed a clearly established standard of law "governing [the official's] conduct," 457 U.S. at 819, the panel opinion here held that only lack of clearly established law regarding the plaintiff's right, rather than regarding jurisdiction, warranted qualified immunity. 733 F.2d at 932–33; App. A at 17a–18a.

Davis v. Passman declined to decide whether the Speech or Debate Clause placed Congressional employment practices outside the courts' jurisdiction. After *Davis v. Passman,* there existed, and continues to exist, substantial uncertainty as to whether a court or "any other place" outside the Congress has jurisdiction governing such matters. Now, however, a Member who necessarily carried out his official duties in the face of that uncertainty finds that he cannot raise the uncertainty as a defense. At his peril, he must forecast the future holdings of the courts, and the court of appeals will hold him strictly

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agents or officers of the respective houses." *Page v. District of Columbia,* 20 App. D.C. 469, 474 (1902). The House has delegated authority concerning the plaintiff's former position to the Committee and Subcommittee.

liable for predicting where the jurisdiction line will be drawn.

The new doctrine of the court of appeals sets up a strange tension with *Harlow*. In *Harlow* this Court declined, as it had in *Procunier v. Navarette*, to "define[ ] the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.' " 457 U.S. at 818 n.32 *quoting Procunier*, 434 U.S. 555, 565 (1978). Regarding elements of the plaintiff's case, it may well be that nothing less than a ruling by this Court *against* a federal official's position establishes sufficiently clear law to hold him liable. Yet regarding the jurisdictional lines drawn in the Constitution to protect the integrity of the coequal Branches, even a ruling by this Court almost *favorable* to him—an explicit ruling reserving the issue and indicating that uncertainty is well taken—still lets him be held liable. If such novel inroads must be created in the doctrine of qualified immunity—if the burden of uncertainty in the law must be shifted onto defendants performing official government functions in good faith—then only this Court should so decide.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1425

ANNE W. WALKER, APPELLANT

v.

HONORABLE ED JONES,
CONGRESSMAN OF THE UNITED STATES, ET AL.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-02723)

Argued November 16, 1983

Decided May 1, 1984

John J. Gilece, Jr., with whom *William Harry Garber* was on the brief, for appellant.

Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives, with whom *Steven R. Ross*, Deputy Counsel to the Clerk, U.S. House of Representatives, and *Michael L. Murray*, Assistant Counsel to the Clerk, U.S. House of Representatives, were on the brief, for appellees.

Before: WILKEY and GINSBURG, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* MACKINNON.

GINSBURG, *Circuit Judge*: This case concerns the discharge of a woman who managed the House of Representatives' restaurants; it presents an unsettled issue relating to the Constitution's command that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

Plaintiff-appellant Anne W. Walker alleged in her complaint that, because she is a woman, and in violation of her fifth amendment rights to due process and the equal protection of the laws, she was discharged from her employment, of approximately ten years' duration, as general manager of the House of Representatives Restaurant System. She asserted that the discharge was effected by defendant-appellee Ed Jones, then Chairman of the Subcommittee on Services of the House of Representatives Committee on House Administration, acting in concert with defendant-appellee Thomas B. Marshall, then Staff Director of the Subcommittee. The District Court dismissed the complaint at the threshold in response to defendant-appellees' motion, which cited Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure. Walker's discharge was a personnel action "within the 'legislative sphere,'" the District Court concluded; it therefore held that the Speech or Debate Clause wholly immunized the termination of her employment from judicial inquiry. *Walker v. Jones*, 557 F.Supp. 366, 368 (D.D.C. 1983).

We reverse the judgment to the extent that it dismisses the case against Jones and Marshall,[1] and re-

[1] Walker also named as defendants, in addition to the Subcommittee's Chairman and Staff Director, two other persons, then Representatives Mollahan and Coyne, who served as

mand for further proceedings. The Speech or Debate Clause, we hold, does not impregnably shield from court consideration allegedly unconstitutional personnel actions taken in the course of managing congressional food service facilities.

I. BACKGROUND

The District Court dismissed Walker's action with only her complaint and the Rule 12(b) motion before it. We must therefore assume the truth of Walker's allegations. As the Supreme Court has instructed lower federal courts: "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (citing as applicable to a motion to dismiss grounded on asserted eleventh amendment and executive immunity barriers to suit the standard set out in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).[2] We

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Subcommittee members at the time of the episode in suit; these Representatives allegedly delegated their authority to participate in the hiring and termination of employees to Jones and Marshall, and knew that Jones and Marshall intended to discharge Walker. The complaint attributes no actual participation in the termination of Walker's employment to Mollahan and Coyne. *See infra* pp. 14-15. We find the allegation concerning their delegation too peripheral and insubstantial to warrant retaining them as parties-defendant. Walker, if her claim has merit, can achieve full relief without drawing in persons uninvolved in carrying out her discharge. We uphold the District Court's judgment to the limited extent that it dismisses the action against Mollahan and Coyne, and to that extent only.

[2] In near total disregard of this instruction, the dissenting opinion reads the complaint's allegations in the light least favorable to Walker, accepts as fact unsworn, undocumented contention presented by a pre-answer motion to dismiss, and apparently would bar Walker's recourse to the discovery process to obtain any information or evidence relevant to her opponents' allegations.

summarize first Walker's salient assertions along with related undisputed facts; we next indicate the bases on which defendant-appellees seek affirmance of the District Court's judgment; we then describe the main lines of the District Court's opinion.

The Subcommittee on Services of the House of Representatives Committee on House Administration (hereafter, Subcommittee) operates congressionally-owned food services; other auxiliary facilities within the Administration Committee's province include barber shops, beauty shops, and parking facilities. *See* Joint Appendix (J.A.) 70, 71. In December 1970, Walker alleges, the Subcommittee engaged her to manage Longworth Cafeteria and shortly thereafter appointed her general manager of the entire House of Representatives Restaurant System (hereafter, HRRS). HRRS encompasses three cafeterias, four carryouts, two catering operations, and one full-service restaurant. Walker had authority to take actions necessary and proper for the efficient operation and sound management of HRRS. Her work, she asserts, entailed no functions relating to the process of lawmaking. Nor does restaurant management involve "other matters" of state "which the Constitution places within the jurisdiction of either House," *Gravel v. United States*, 408 U.S. 606, 625 (1972), such as impeachments and advice and consent to treaties and appointments. Walker states that she expected to retain her position so long as her performance was satisfactory. She attributes this expectation primarily to communications she had with Subcommittee members when she was hired and throughout her employment.

During Walker's tenure as HRRS general manager, defendant-appellee Ed Jones became Chairman of the Subcommittee and defendant-appellee Thomas B. Marshall became its Staff Director. Pursuant to Subcommittee authorization, Jones and Marshall exercised managerial and control functions over HRRS employees,

including Walker. In 1980, Walker alleges, Jones indicated approval of her work and informed her he was increasing her salary by $8,000 per annum because of her efficiency in operating HRRS. She further asserts that, until June 1982, Marshall permitted her to run HRRS without intervention. Walker alleges, however, that her situation at work changed around that time. She claims that Jones stated to others, and Marshall repeated to staff members, that because of Walker's sex, she was overpaid; specifically, Walker recites Jones's alleged statement that her salary ($45,000, according to Walker) was "ridiculous for a woman."

At a May 1982 meeting with Jones and Marshall, Walker allegedly detailed HRRS's operations and profit structure. Her accounting, she asserts, elicited no comment; the meeting concluded, she states, without any expression by Jones or Marshall of dissatisfaction with her performance. By letter dated June 22, 1982, however, Jones advised Walker that he was terminating her employment effective June 30, 1982;[3] and on June 25, 1982, Marshall circulated a memorandum to "All Managers and Department Heads" announcing that, effective June 26, "the office of General Manager of the House Restaurant System will be vacated." In July 1982, Jones and

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[3] Jones wrote (J.A. 64):

> It is with regrets that I must terminate your employment as General Manager of the House Restaurant System effective June 30, 1982.
>
> By copy of this letter to the Administrative Office, I am authorizing them to pay you for one month as separation pay plus any accrued annual leave you may not have used.
>
> . . . .

Marshall engaged a man to occupy the general manager's position formerly held by Walker.[4]

After Walker's discharge, Jones made public statements, which Walker alleges he knew to be untrue, charging Walker with inefficiency, improper bookkeeping practices, misappropriation, and "skimming" funds from HRRS. Walker asserts that, in addition to loss of her House employment and attendant benefits, the discharge and accusations relating to it caused her to suffer physical and emotional distress, permanently damaged her reputation, and left her unable to obtain employment comparable in nature and salary.

Jones and Marshall claim that the Speech or Debate Clause entirely shields the discharge of Walker from judicial inquiry. Appellees' presentation blends the bases for this claim of blanket legislative immunity. We detect, however, two principal strains in appellees' argument, and an overarching position. Appellees contend in one prominent theme that Walker's high post as manager of a "multimillion dollar food service" organization made her a "ranking aide[]" or "alter-ego" of the Subcommittee. *See* Brief for Appellees at 11, 19-20. They also assert repeatedly that the discharge decision qualifies as a legislative act because it was reached and effected "in committee." *See id.* at 10, 15-16, 25.[5] Throughout, they

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[4] For lack of specificity, the dissenting opinion [at 21-22] would hold the complaint inadequate to state a claim against Marshall. But Walker plainly identifies Marshall, acting together with Jones, as a prime mover in her discharge. To survive dismissal under Rule 12(b), she was not required to plead further particulars. *See supra* text accompanying note 2.

[5] In support of this assertion, a page, unaccompanied by any affidavit, is attached to the motion to dismiss, *see* J.A. 63, indicating that the Subcommittee met in executive session on May 26, 1982. The page provides no information on Walker's discharge. In addition to the heading "Executive Session," the date, Subcommittee name, and list of persons present, it states in its entirety: "The subcommittee met, pursuant to

observe that food service caters to a need essential to the chamber's internal functioning. Personnel management for such an essential service, they urge, merits Speech or Debate coverage as fully as passage of a bill. *See id.* at 10, 17, 20, 22.

In addition to Speech or Debate shelter, Jones and Walker assert that members of Congress have absolute or at least qualified official immunity with respect to legislative branch personnel decisions,[6] and that in any event Walker has stated no claim upon which relief can be granted. *Id.* at 38-44. The District Court did not address these alternatively alleged grounds for dismissal. Nor did it refer to appellees' "alter-ego" and "in com-

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call at 9 a.m., in Room H-328, The Capitol, Hon. Ed Jones (chairman of the Subcommittee) presiding." Walker questions whether the discharge decision was even discussed at the May 26, 1982, meeting; she points out that the actions of Jones and Marshall, terminating her employment, occurred almost a month later. *See* Brief for Appellant at 17; Reply Brief for Plaintiff-Appellant at 9.

[6] Brief for Appellees at 25-37. Appellees further contend that "insofar as appellant sought to compel back pay and reinstatement, appellant sought, in reality, to compel the United States to remedy the alleged wrong, and therefore, the action was barred by sovereign immunity." *Id.* at 5. Appellant's compensatory and punitive damage claims seek no money from the United States Treasury; instead, in suing individual defendants, appellant is simply following the private right of action path first marked in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See* Davis v. Passman, 442 U.S. 228 (1979). We note also that, in 1976, Congress eliminated sovereign immunity as a defense in all equitable actions for specific, nonmonetary relief against a United States agency or officer acting in an official capacity. *See* 5 U.S.C. § 702, *as amended by* Pub. L. No. 94-574, 90 Stat. 2721 (1976); S. REP. No. 996, 94th Cong., 2d Sess. 7-8 (1976); H.R. REP. No. 1656, 94th Cong., 2d Sess. 7-9 (1976). *See also* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 919 (1982).

mittee" arguments. It simply reasoned that internal arrangements Congress makes for its own necessities are "within the 'legislative sphere' "; that food service qualifies as such an arrangement; and that discharging Walker, as an action relating to the internal administration of Congress, is brigaded by Speech or Debate protection in light of precedent instructing broad interpretation of the Clause "to effectuate its purposes." 557 F. Supp. at 367-68 (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975)).

It is the high purpose of the Speech or Debate Clause to secure against executive or judicial interference the processes of the nation's elected representatives leading up to the formulation of legislative policy and the enactment of laws. *See Hutchinson v. Proxmire*, 443 U.S. 111, 126-27 (1979). For the reasons set out below, however, we believe that personnel actions regarding the management of congressional food services are too remote from the business of legislating to rank "within the legislative sphere."

II. Decision

In Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981), Congress prohibited, inter alia, sex discrimination in private and public employment. Congress exempted its own staffs, however, from Title VII's coverage. *See id.* § 2000e-16(a). In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court implied a remedy directly from the fifth amendment for sex discrimination by a member of Congress in dismissing a female staff member. The Court left open for consideration on remand the applicability of the Speech or Debate Clause to congressional employment practices. *See id.* at 235-36 n.11, 249. This case presents one setting in which that issue arises.

In the discussion that follows, we explain first our reasons for holding that the Speech or Debate Clause

does not bar Walker's complaint against Jones and Marshall. We then indicate why we believe Walker's action survives the alternative threshold defenses appellees present—immunity outside the Speech or Debate Clause, and failure to state a claim upon which relief can be granted.[7]

A. *Constitutional review by courts of the discharge of a congressional employee who performed auxiliary, nonlegislative services for the convenience of members of Congress is not barred by the Speech or Debate Clause.*

1. *The province of the Speech or Debate Clause.*

The Speech or Debate Clause derives from the English Bill of Rights of 1689; it concerns a privilege "recognized [since the Glorious Revolution in Britain, and throughout United States history] as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 177, 178 (1966). The purpose of the protection secured by the

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[7] Because the District Court dismissed Walker's complaint on Speech or Debate Clause grounds, it did not reach these alternative defenses. Ordinarily, a federal appellate court will not consider issues left undecided by the trial court; here, however, the nature of the issues and the posture of the case justify our departure from that general rule. *See* Singleton v. Wulff, 428 U.S. 106, 120-21 (1976). The defenses present questions of law fully briefed by the parties. Their adjudication now, informed by an adversarial airing, should occasion no surprise. Reference of these initial issues to the District Court, when that tribunal would not be better positioned than we are at this juncture to address the questions, "would be a waste of judicial resources." Grace v. Burger, 665 F.2d 1193, 1197 n.9 (D.C. Cir. 1981) (quoting United States v. Aulet, 618 F.2d 182, 186 (2d Cir. 1980)), *aff'd in part and vacated in part on other grounds sub nom.* United States v. Grace, 103 S. Ct. 1702 (1983). *See also* Railroad Yardmasters of America v. Harris, 721 F.2d 1332, 1337 (D.C. Cir. 1983).

Clause "is not to forestall judicial review of legislative action," *Powell v. McCormack*, 395 U.S. 486, 505 (1969), but to free legislators from distraction or hindrance as the process of lawmaking unfolds. "The heart of the clause is speech or debate in either House," *Gravel v. United States*, 408 U.S. 606, 625 (1972), but the provision shields more than "words spoken in debate." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). It encompasses, beyond speeches on the floor of Congress, such activity integral to lawmaking as voting, *id.*, circulation of information to other Congress members, *Doe v. McMillan*, 412 U.S. 306 (1973), and participation in committee investigations, proceedings, and reports. *Id.*; *Gravel v. United States*, *supra*; *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951).[8]

The absolute immunity secured by the Clause, however, is "not all-encompassing." *Gravel v. United States*, 408 U.S. at 625. It would demean the high purpose of the Speech or Debate privilege to extend it to official activities of Congress members and their aides in "mundane fields" outside "the legislative core." *Davis v. Passman*, 544 F.2d 865, 880 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*, 442 U.S. 228 (1979). As Chief Justice Burger has stated, "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 507 (1972). Activities "casually or incidentally related to legislative affairs," *id.* at 528, but not "part and parcel of the legislative process," *Gravel v. United States*, 408 U.S. at 626, are outside the realm of Speech or Debate protection.

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[8] *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (Clause covers issuance of subpoenas pursuant to committee investigation).

Thus, for example, a member's report and vote on holding a witness in contempt are immune, but not subsequent conduct to implement the expressed legislative will. *See Kilbourn v. Thompson, supra.* Newsletter and press releases circulated by a member to the public are not shielded, for they are "primarily means of informing those outside the legislative forum." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). A member of Congress may be prosecuted for accepting a bribe or for other unlawful conduct so long as the prosecution "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States v. Brewster*, 408 U.S. at 510 (quoting *United States v. Johnson*, 383 U.S. at 185). *Accord United States v. Helstoski*, 442 U.S. 477 (1979); *see also Gravel v. United States*, 408 U.S. at 618-22. The key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined, *see id.* at 625, but peripheral activities not closely connected to the business of legislating do not enjoy Speech or Debate shelter.

In addition to instruction furnished by High Court precedent, two decisions within this Circuit warrant comment because the District Court relied heavily upon them: *Consumers Union of United States v. Periodical Correspondents' Association*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); and *Parker v. Allen*, Civil No. 74-1846 (D.D.C. June 6, 1975), *reprinted in* J.A. 80-98.

Consumers Union held that arrangements for seating the press in the House and Senate galleries were "integral" to "the legislative machinery," 515 F.2d at 1350, and thus were immune from judicial review by virtue of the Speech or Debate Clause. In contrast to the hiring and firing of a food service manager, the matter at issue in *Consumers Union* immediately concerned House con-

sideration of proposed legislation. Indeed, the arrangements in question were intended to shield members of Congress from press members' use of their House access to lobby legislators. *Id.* at 1347 & n.12. *Consumers Union*, in short, involved, as Walker's discharge surely does not, regulation of the very atmosphere in which lawmaking deliberations occur.

Parker v. Allen, an unpublished District Court decision,[9] bears a considerable resemblance to this case. It involved the discharge of the Senate Restaurant's head waiter and his complaint that fifth amendment due process constraints on government action had been ignored. The District Court in *Parker* characterized restaurant administration as "within the 'legislative sphere,' " slip op. at 9, *reprinted in* J.A. 88, but it nonetheless granted the head waiter significant relief.

The *Parker* complaint was dismissed only insofar as it named as defendants members of the Senate Committee on Rules and Administration; nothing in the *Parker* record indicated that the Senators had done anything beyond considering and voting on the matter in subcommittee. *Cf. supra* note 1. The actual firing of the head waiter, however, was another matter. It was effected by the Architect of the Capitol. That action, the District Court held, as distinguished from the preceding consideration and vote in subcommittee, was "not within the privilege of the Speech or Debate Clause." Slip op. at 12, *reprinted in* J.A. 91. The District Court proceeded to find that the conditions under which the firing occurred did infringe upon a liberty interest protected by the due process guarantee, and it ordered the Architect of the Capitol to accord appropriate relief to the former head waiter. Had the District Court in the case at hand in fact followed *Parker*, as it purported to do, it would

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[9] An unpublished opinion may not be cited to this court as precedent. *See* D.C. CIR. R. 8(f). Because the District Court relied on *Parker*, however, discussion of it here is unavoidable.

have held, as *Parker* did, that the actual discharge "was not . . . essential to the act of legislating and hence [could] not be deemed within the legislative sphere." *Id.*

2. *Personnel actions in the course of superintending congressional food service facilities are outside the province of the Speech or Debate Clause.*

It has been argued persuasively that

> [w]hen members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered.

Davis v. Passman, 544 F.2d 865, 880 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*, 442 U.S. 228 (1979). This case raises a narrower question. We reserve for another day and case the issue whether Speech or Debate protection attends the hiring and firing of congressional staff members who have "a meaningful input into . . . legislative decisionmaking." *Davis v. Passman*, 544 F.2d at 880-81 n.25; *see Nixon v. Fitzgerald*, 457 U.S. 731, 767 n.2 (1982) (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (dictum) ("a personnel decision allegedly made for unlawful reasons . . . does not fall within the . . . legislative . . . functions to which absolute immunity attaches").

Walker alleges that her job as general manager of food services entailed no function relating to the process of making laws. Appellees insistently urge, however, that she was indeed a "ranking aide[]," and "alter-ego" of the Subcommittee. *See* Brief for Appellees at 11, 19-20. They compare her to the aide who helped Senator Gravel prepare for and conduct the Senate subcommittee hearing at which the Senator read from the Pentagon Papers, and placed them in the public record. *Id.* at

19-20; *see Gravel v. United States*, 408 U.S. 606, 609 & n.3 (1972). We find the comparison far-fetched.

Personnel who attend to food service, medical care, physical fitness needs, parking, and haircutting for members of Congress no doubt contribute importantly to our legislators' well-being and promote their comfort and convenience in carrying out Article I business. But these staff members, unlike those who help prepare for hearings or assist in the composition of legislative measures, cater to human needs that are not "intimately cognate," *Davis v. Passman*, 544 F.2d at 879, to the legislative process. The "fundamental purpose" of the Speech or Debate Clause is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*." *Gravel v. United States*, 408 U.S. at 618 (emphasis added). Auxiliary services attending to human needs or interests not peculiar to a Congress member's work qua legislator may advance a member's general welfare. To characterize personnel actions relating to such services as "legislative" in character, however, is to stretch the meaning of the word beyond sensible proportion. Selecting, supervising, and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences the shaping of our nation's laws.

Nor do we grasp why consideration or a vote "in committee" should place all personnel superintendence of auxiliary services of a nonlegislative character inside a "legislative sphere." Assuming arguendo that anything done "in committee" is necessarily a "legislative act[]," *see* Brief for Appellees at 10, Walker's complaint against Jones and Marshall nonetheless survives a Rule 12(b) motion.

We note initially that Walker's complaint, far from alleging that her discharge was effected "in committee," states: "During June 1982, Defendants Jones and Mar-

shall discharged plaintiff from employment . . . ." Complaint ¶ 16, *reprinted in* J.A. 12. She does not center her case on any vote, resolution, hearing, report, or proceeding in the House or a committee or subcommittee thereof. Instead, she dominantly charges illegal conduct beyond the protection of the Speech or Debate Clause—the carrying out or execution of a constitutionally flawed decision.[10]

In two respects, we believe, appellees misread the High Court precedent they cite. First, they do not separate whatever may have occurred "in committee" from ensuing activity to execute a committee vote. Second, they appear to assume that only aides, not members of Congress themselves, are answerable for carrying out an unlawful or unconstitutional directive. *See* Brief for Appellees at 16.

The Supreme Court has drawn a key distinction, not squarely faced by appellees, between "legislative speech or debate and associated matters such as voting and committee reports and proceedings," on the one hand, and "executing a legislative order," or "carrying out [legislative] directions," on the other hand. *Gravel v. United States*, 408 U.S. at 620-21; *see also Doe v. McMillan*, 412 U.S. 306, 314-15 (1973). The former, the Supreme Court has emphasized, is what the Speech or Debate Clause shields. But its precedent, the Court has cautioned, "reflect[s] a decidedly jaundiced view toward extending the Clause" to shield the latter. *Gravel v. United States*, 408 U.S. at 620.

Further, the Supreme Court has indicated that the Speech or Debate Clause immunity of the Congress mem-

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[10] Assiduously reading a plaintiff's opening pleading, on a threshold motion to dismiss, in the light most favorable to the defendants, *see supra* note 2 and accompanying text, the dissenting opinion [at 17-18] picks out a piece of the complaint to avoid fair description of the full pleading.

ber is no different from that of the member's ranking aides. *Id.* at 616-22. Specifically, the Court has observed that lines drawn in its opinions do not "involve[] distinguishing between a [member of Congress] and his personal aides with respect to legislative immunity." *Id.* at 621. "[B]oth aide and Member should be immune with respect to committee and House action leading to [an] illegal resolution." *Id.* But no case "[holds] that Members of Congress would be immune if they [personally] executed an invalid resolution." *Id.* "Neither [members of Congress] nor their aides should be immune from liability or questioning in such circumstances." *Id.*[11] Walker complains of Jones's execution, in concert with Marshall, of what appellees term a legislative order. As we read the High Court's instruction, neither Jones's status as a Congressman nor characterization of the underlying decision as "legislative" affords Jones or his aide, Marshall, absolute immunity from liability for carrying out that decision.[12]

In sum, appellees' "in committee" argument cannot carry the weight appellees would place upon it. The argument fails to advert to the Supreme Court's instruction that execution of a decision, even if the decision itself is properly called "legislative," is not cloaked with

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[11] We recognize that the Supreme Court has not to date had occasion to hold a member of Congress unprotected by the Speech or Debate Clause on the ground that the challenged action executed an illegal, but sheltered, legislative decision. The Court has several times held legislative aides unprotected on that ground. *See* Doe v. McMillan, 412 U.S. 306 (1973) (public distribution of materials allegedly invading plaintiffs' privacy); Powell v. McCormack, 395 U.S. 486 (1969) (refusal to admit, pay, and perform services for Congressman illegally excluded by the House); Kilbourn v. Thompson, 103 U.S. 168 (1880) (imprisonment of plaintiff for defiance of illegal congressional subpoena).

[12] As to the qualified immunity defense proffered for Jones and Marshall, see *infra* pp. 17-18.

Speech or Debate immunity, for execution or carrying out directions post-dates what the Clause protects—the *process* leading up to the issuance of legislative directions.

B. *Official immunity does not support the threshold dismissal of Walker's action.*

Nixon v. Fitzgerald, 457 U.S. 731 (1982), held the President absolutely immune from suit based on his personnel decisions. Appellees invite us to declare the same rule applicable to members of Congress. Lower courts are not positioned to entertain such argument; the Supreme Court has instructed that absolute immunity for members of Congress does not extend beyond the scope of the Speech or Debate Clause. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982); *Davis v. Passman*, 442 U.S. 228, 235 n.11, 246 (1979).

Members of Congress may assert the same qualified immunity available to executive officials; officials can prevail on this ground if they establish that "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818; *see also id.* at 807. Appellees center their argument for qualified immunity on the less than crystalline state of the law regarding the Speech or Debate Clause. Their argument is misguided. Under the heading of qualified immunity, they should not have addressed the question whether they are subject to suit at all, however clear the charge that their conduct violated an alleged right. Instead, the relevant inquiry is whether the conduct complained of—for example, the alleged sex discriminatory discharge,[13] or the alleged liberty-depriving job termination accompanied

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[13] *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982); Davis v. Passman, 442 U.S. 228 (1979); Frontiero v. Richardson, 411 U.S. 677 (1973).

by reputation-damaging public utterances [14]—violated a clearly established constitutional right. The blank record and misdirected argument now before us, in short, supply no justification for dismissing this action on a qualified immunity ground.[15]

C. *Walker's complaint is not susceptible to dismissal for failure to state any claim upon which relief can be granted.*

Appellees ultimately argue that Walker has stated no claim upon which relief can be granted. High Court precedent precludes the District Court from tying instant dismissal of Walker's action to that defensive plea.

Walker's complaint alleges she was dismissed from her post as HRRS general manager because of her sex. In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court held that a claim for damages based on a sex discriminatory congressional employment decision can be presented directly under the fifth amendment. Walker has stated just such a claim.

Moreover, Walker asserts that Jones, in accounting for Walker's discharge, publicly uttered reputation-damaging statements about her, knowing those statements to be false. In particular, Jones allegedly said Walker had misappropriated and "skimm[ed]" funds from HRRS. In *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court held that defamation by a public official, without more, does not intrude on a liberty or property interest protected by the due process guarantee. But *Paul* sug-

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[14] *See* Paul v. Davis, 424 U.S. 693, 709-10 (1976); Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[15] In any case, qualified immunity presents no bar to Walker's claim for injunctive relief. *See* Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975); Gannon v. Daley, 561 F.Supp. 1377, 1387 n.27 (N.D. Ill. 1983) (collecting cases); *see also* NTEU v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); *supra* note 6.

gested that when discharge from government employment accompanies an utterance stigmatizing a person's good name, a due process claim may well lie. *See* 424 U.S. at 710 (*Board of Regents v. Roth*, 408 U.S. 564 (1972), "recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation.").[16] Walker's complaint is lean with respect to the facts of her employment-plus-reputation claim, but she has said enough to enter the court's door and receive a focused answer. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

CONCLUSION

We have limited this examination to the question whether Walker's complaint tenders any claim which, if proved, could entitle her to relief. The answer to that question is "yes." We hold simply and only that personnel actions of the kind Jones and Marshall are alleged to have taken, if effected for unlawful reasons, do not fall within the legislative functions to which the absolute immunity of the Speech or Debate Clause attaches.[17]

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[16] The force of the cited precedent is essentially conceded by appellees. *See* Brief for Appellees at 42. Appellees contend, however, that Walker had a "hearing [before the Subcommittee] sufficient to meet the notice and hearing requirements of due process." *Id.* at 43. Walker's complaint, in contrast to appellees' misreading of it, refers only to a meeting with Jones and Marshall in May 1982, not to any meeting with the Subcommittee. Indeed, Walker flatly denies ever receiving a hearing before the Subcommittee, Jones, Marshall, or anyone else on the adequacy of her performance or her discharge. Reply Brief for Plaintiff-Appellant at 9; *see also supra* note 5. The issue thus entails a dispute as to the facts; it plainly is not susceptible to resolution on a threshold motion to dismiss the complaint.

[17] Our holding rests on the sole pleading thus far presented —Walker's complaint. We foreclose no ruling further development of the facts may warrant.

For the reasons stated, the judgment of the District Court is reversed to the extent that it dismisses Walker's complaint against Jones and Marshall, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MACKINNON, *Senior Circuit Judge* (*dissenting in part and concurring in part*): This case presents important separation-of-powers questions concerning judicial review of Congress' hiring and firing of its own employees. While I concur in part with the majority's decision that this case should be remanded to the district court for litigation of certain factual allegations, I cannot join in much of the opinion. I believe that the majority's constitutional analysis is flawed.

In my opinion, the trial court's dismissal of the complaint against three of the four defendants—Representatives Mollohan and Coyne, and Subcommittee staff director Marshall—should be upheld on the grounds of Speech or Debate immunity. As to the immunity of Representative Jones only, I would remand to the district court for a further narrow inquiry made necessary by recent Supreme Court opinions distinguishing between legislative decisions and subsequent ministerial acts. I write separately both to emphasize factual aspects of this case not adverted to in the majority opinion, and to outline the Speech or Debate analysis that in my view ought properly to be applied to this case.

1. THE PROCEDURAL SETTING OF THIS CASE

Presented for review by this Court is the district court's dismissal of plaintiff's case against *four* defendants—three Members of Congress and one House subcommittee staff director. The three Members named served on the House Administration Committee and constituted a majority of the House Subcommittee on Services. *See* Complaint ¶ 17 (JA 12-13). The district court held all aspects of the alleged conduct of the four defendants immune under the Speech or Debate Clause. Although other issues are presented, the chief questions before this Court concern Speech or Debate.

The most important factual allegations at this stage of the case are those relating to the defendants' asserted

immunity under the Speech or Debate Clause.[1] The allegations in the complaint and plaintiff's opposition to the motion to dismiss are extremely vague. That vagueness made the task of the district court a difficult one. In my opinion, the majority fails to conduct the sort of incisive inquiry into the pleadings that is imperative in this case. The majority treats plaintiff's factual allegations as true for the purposes of this appeal, citing cases requiring the liberal reading of a complaint in the face of a Rule 12 (b) (6) motion to dismiss for failure to state a claim. In addition to the complaint, however, the district court had before it the defendants' motion to dismiss—which differed significantly from the complaint as to the facts of the case—and the plaintiff's opposition thereto. Furthermore, it is important to recognize that the defendants' motion was filed under Rule 12(b) (1) as well as under 12(b) (6). Threshold disputes over *jurisdictional* matters differ substantially from disputes over whether a complaint adequately states a cause of action. In particular, when the movant denies or controverts the plaintiff's factual allegations going to subject matter jurisdiction, the burden is on the opposing party to assert jurisdiction, and the recitals in the complaint are no longer controlling. *See KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1350 at 555, § 1363 at 653-54 (1969).

In my opinion, the issues of Speech or Debate immunity here presented are jurisdictional in nature, fall under Rule 12(b) (1) rather than 12(b) (6) for purposes of the motion to dismiss, and should be treated accordingly upon the pleadings in this case. Close scrutiny of the facts relating to defendants' legislative immunity is

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[1] I concur with the majority that plaintiff's allegations might, if proved, make out a valid cause of action against a proper defendant for unconstitutional gender discrimination. *See* Davis v. Passman, 442 U.S. 228, 246, 248 (1979). The case would be justiciable. *See id.* at 235 n.11.

appropriate. The proper categorization of Speech or Debate immunity as a jurisdictional matter is based upon the constitutional text of the Clause, upon its history and purpose, and upon Supreme Court precedent. Although the Clause is found in Article I rather than Article III of the Constitution, the text is cast in jurisdictional terms:

> The Senators and Representatives . . . for any Speech or Debate in either House, . . . *shall not be questioned in any other Place.*

U.S. Const. art. I, § 6, cl. 1 (emphasis added). This language must be read as an independent limitation on the federal judicial power, in addition to those limitations imposed by Article III itself. The historical background of the Clause confirms this conclusion: the establishment of Speech or Debate immunity in England represented "the culmination of a long struggle for parliamentary supremacy"—a struggle by Parliament to fend off the efforts of the Tudors and Stuarts to enlist the courts in their harassment and disciplining of legislators. *United States v. Johnson*, 383 U.S. 169, 178 (1966); *see id.* at 177-83. The provision in the English Bill of Rights that was the direct ancestor of the Clause was framed as follows:

> That the Freedom of Speech, and Debates or Proceedings in Parliament, *ought not to be impeached or questioned in any Court* or Place out of Parliament.

1 W.&M. Sess. 2, c.2 (1689) (emphasis added). In its transplanted form, Speech or Debate immunity was constitutionalized as a limitation on the powers of the Executive and Judicial branches to intrude into the legislative sphere. *See, e.g., United States v. Helstoski*, 442 U.S. 477, 491 (1979) (citations omitted).[2] As

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[2] In 1797, during a federal grand jury investigation into the activities of several anti-Federalist Members of Congress,

judicial review has evolved, the Clause has come to be seen primarily as a limitation on the *authority of courts* to question legislative conduct. That recognizes it as a jurisdictional matter.

Although the Supreme Court has never explicitly addressed the place of Speech or Debate immunity within the procedural scheme of Rule 12(b), there is ample authority for treating legislative immunity as a jurisdictional matter in this context. Threshold resolution of Speech or Debate issues has been deemed critical. The Court has held that the Clause is designed to relieve legislators not only from adverse judgments upon protected activities, but also from the annoyance and burden of defending suits. *See Powell v. McCormack*, 395 U.S. 486, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Any suit that attempts to skirt the barrier of legislative immunity by resort to vague and conclusory pleadings is just such an annoyance and burden. The Court has explicitly mandated that Speech or Debate defenses "should . . . be given priority . . ." in litigation. *Davis v. Passman*, 442 U.S. 228, 236 n.11 (1979).[3]

Thomas Jefferson wrote an essay on the constitutional legislative privilege. One representative statement that illuminates the jurisdictional nature of the Speech or Debate Clause is the following:

> [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, *that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the . . . Judiciary . . . .*

8 Works of Thomas Jefferson 322-23 (Ford ed. 1904). James Madison supported Jefferson's essay. *See generally* Reinstein & Silverglate, "Legislative Privilege and the Separation of Powers," 86 Harv. L. Rev. 1113, 1140-42 (1973) (early history of Clause).

[3] In a closely analogous context, the Supreme Court has expressed a strong preference for threshold resolution of

Courts have a constitutional obligation to reach legislative immunity issues as early as possible, consistent with sound judicial practice, and to excuse legislative defendants expeditiously when the case so warrants. Furthermore, the Court has held that like a pure matter of subject matter jurisdiction, Speech or Debate immunity cannot be waived by the failure of a defendant to assert it at the threshold. *See United States v. Helstoski, supra,* 442 U.S. at 492. In my mind, the sum of the Supreme Court's pronouncements on the procedural treatment of Speech or Debate issues strongly supports resolving such issues under Rule 12(b)(1), which covers subject matter jurisdiction, rather than under 12(b)(6).

On this basis, while the district court may have been overly precipitous in excusing all four defendants from this case at this early stage, the majority here errs in the opposite direction. At the stage in this case when the district court passed on the motion to dismiss, the burden was on the plaintiff to show that the conduct of defendants placed in question by the complaint was *not* immune from the court's scrutiny. In their motion to dismiss, defendants generally asserted their Speech or Debate immunity, stating that plaintiff's discharge "constitutes an internal policy decision which was effectuated 'in committee.'" Defendants' Motion to Dismiss at 9 (JA 35). Beyond that, however, defendants made factual assertions concerning their immunity that went well beyond the complaint, and that took issue with the complaint's allegations. In particular, defendants alleged a May 26, 1982, meeting of the *full Subcommittee*, convened at the request of plaintiff, in which consideration was given to plaintiff's job performance, and at which a vote was taken delegating the Subcommittee's authority to hire and fire to the Chairman. *See* Defendants' Motion to

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official immunity questions. *See* Harlow v. Fitzgerald, 457 U.S. 800, 808, 818-19 (1982). *See generally* Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949) (L. Hand, J.).

Dismiss at 3-4 (JA 29-30). As to the execution of the discharge, defendants asserted that the "decision implemented here did not involve legislative agents or functionaries; it was ordered *and* implemented by Members alone." *Id.* at 19 (JA 45).[4] Thus the motion to dismiss was more than a challenge to the sufficiency of plaintiff's allegations; it went to the factual predicates of the district court's jurisdiction over the case.[5] The burden was then upon plaintiff to support the jurisdiction that she claimed.

In response to the motion, plaintiff did nothing more than to recite the factual allegations of the complaint—allegations that were no longer controlling. Plaintiff introduced no affidavit in support of her original allegations. In contrast to the original complaint, however, the recital of facts *did not* allege that staff director Marshall had actually participated in the execution of the decision to discharge. *See* Plaintiff's Opposition to Motion to Dismiss at 3 (JA 106). Plaintiff argued, instead, that Marshall should be held legally responsible as Representative Jones' "alter ego for purposes of liability." *Id.* at 15 (JA 118). This was the posture of the case when the district court made its ruling. The majority opinion fails to account fully for this situation. Upon this record, the trial court did not err in dismissing the complaint

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[4] Defendants also denied that Marshall had any authority to discharge plaintiff. Defendants' Motion to Dismiss at 19 (JA 45). Plaintiff had alleged that the Subcommittee majority had delegated such authority to Representative Jones and Mr. Marshall. Complaint ¶ 17 (JA 13).

[5] Plaintiff was apparently aware that defendants' motion went beyond the sufficiency of the allegations in the complaint. At oral argument upon the motion to dismiss, counsel for plaintiff stated "I think the defendants have gone beyond the allegations of the complaint in this particular instance for the purposes of this motion." Walker v. Hon. Ed Jones, Civ. A. No. 82-02723, Transcript of Proceedings of Feb. 9, 1983, at 15 (JA 139).

as to Representatives Coyne and Mollahan and Subcommittee staff director Marshall.

In addition, beyond refusing to uphold the district court's dismissal of three defendants from this suit, the majority in its generalizations fails to provide the district court with specific guidance as to how to dispose of the case correctly. The majority decision contains broad language that would appear to foreclose defendants from any further assertion of their Speech or Debate immunity, even if certain relevant factual allegations cannot be supported by evidence. *But see* Majority Decision at 19 n.17. Under a proper construction of the Speech or Debate Clause, however, defendants Jones and Marshall can be held non-immune, if at all, only upon further development of the facts. In particular, one question of critical importance is whether Representative Jones himself took steps to "execute" the Subcommittee's decision to fire appellant. Collateral to this issue is whether Walker was not effectively fired when the Subcommittee acted and Jones' subsequent actions had no substantive effect. The remainder of this opinion will demonstrate the various ways in which the majority's Speech or Debate analysis is flawed, and will suggest how the Clause should be applied to the alleged facts of this case.

2. The Proper Scope of Speech or Debate Immunity

The manner in which the majority addresses the question of defendants' Speech or Debate immunity departs radically from settled tradition and precedent and undercuts the constitutional purposes of legislative immunity. The majority fails adequately to recognize that the scope of Speech or Debate immunity must be determined in accordance with the constitutional functions of Congress, which are varied and far-ranging. Furthermore, the Speech or Debate Clause must be construed in harmony with the broader constitutional scheme of separated pow-

ers, and with its specific textual components.[6] Such an analysis is made all the more indispensable by the Supreme Court's pronouncement that *only* the Speech or Debate Clause can shield congressional employment decisions from judicial review, and that separation-of-powers concerns must be resolved in the context of legislative immunity. *See Davis v. Passman*, 442 U.S. 228, 235-36 n.11 (1979).[7]

A. *Legislative Supervision of the House Restaurant and the Legislative Sphere*

After an abstract and detached discussion of the scope of Speech or Debate immunity, the majority launches an argument that legislative supervision of the House Restaurant System inherently lies *outside* the legislative sphere. *See* Majority Opinion at 13-14. The majority flatly states that "[p]*ersonnel actions in the course of superintending congressional food service facilities are outside the province of the Speech or Debate Clause.*" Majority Opinion at 13. The opinion argues that food services to the House are not vital to the democratic process, and concludes that "[t]o characterize personnel actions relating to [restaurant] services as 'legislative' in character . . . is to stretch the meaning of the word beyond sensible proportion." *Id.* at 14. This entire approach is badly misguided, and constitutes a dangerous attack upon the integrity of the Legislative branch. The

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[6] "In the American governmental structure the [Speech or Debate] clause . . . reinforc[es] the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178 (1966) (citing The Federalist No. 48 (J. Madison) (Cooke, ed.)).

[7] In light of the Supreme Court's ruling that Speech or Debate immunity constitutes the *sole* separation-of-powers barrier to adjudication of such cases, the majority's indication that qualified official immunity might shield defendants from liability in this case is puzzling. *See* Majority Opinion at 17-18.

question here is not whether House supervision of its Restaurant conforms to some Platonic ideal of the "legislative" process, but rather whether the House has in practical fact treated the subject as a legislative matter in the constitutional sense. The majority professes not to understand what difference it makes whether plaintiff's discharge was effectuated in committee, *id.* at 14, but that question is the very nub of this case. If supervision of the Restaurant, including review of plaintiff's performance as General Manager of the system, was conducted entirely within the jurisdiction of the Subcommittee, then the majority's suggestions that the subject is "mundane," *id.* at 10, or not an important matter "of state," *id.* at 4, are wholly gratuitous.

The majority appears to believe that certain of Congress' internal administrative operations can be distinguished in a principled way from other legislative activities. In essence, this approach creates categories—"administrative" versus "legislative"—to distinguish among various subjects over which Congress chooses to exercise its powers. These categories find no basis whatsoever in Speech or Debate precedent. Not one Supreme Court decision even hints at such a constitutional distinction between various fields of congressional activity. The Supreme Court has distinguished between the "legislative" and "political" acts of Members of Congress for purposes of Speech or Debate immunity: the latter, unprotected category encompasses such activities *outside* Congress as constituent services (*e.g.*, lobbying for government appointments, assistance in obtaining government contracts) and speechmaking. *See United States v. Brewster*, 408 U.S. 501, 512 (1972). In addition, the Court has held outside Speech or Debate immunity such actions as the taking of a bribe, *see id.* at 526; the private republication of government documents, *see Gravel v. United States*, 408 U.S. 606, 627 (1972); and false imprisonment. *See Kilbourn v. Thompson*, 103 U.S. 168

(1881). These acts are all tangential to the performance of legislative duties. The focus of Supreme Court cases, however, has always been on the relation of the individual's *act* in question in relation to the *legislative process*—not on the subject matter involved. Therefore these precedents provide the majority with no support whatsoever.[8]

The majority's sharp departure from existing law reflects an even deeper problem in its approach. Except in the most egregious of cases, this Court has no authority whatsoever to pass judgment on whether activities that the Congress treats as legislative conform to some artificial ideal of the legislative process. The majority in this case states that the entire *subject matter* of the Subcommittee's activity—the oversight of restaurant services—lies outside the legitimate sphere of legislative activity. This judgment fails to accord to the House the respect that any court owes a coordinate branch of government. Both the legislative facts of this case and the established construction of the Speech or Debate Clause will bear out this criticism.

At the very core of our constitutional separation of powers, we find the following provision:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

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[8] Those cases upon which the majority does rely are extremely weak precedent. Primary reliance is placed upon the original panel decision in Davis v. Passman, 544 F.2d 865, 880 (5th Cir. 1977), which was *reversed* en banc on other grounds, 571 F.2d 793 (5th Cir. 1978), and in which case the Speech or Debate issue was ultimately mooted by a settlement by the parties after the Supreme Court decision. The majority also relies substantially on *remote dicta* in a *dissenting* Supreme Court opinion, Nixon v. Fitzgerald, 457 U.S. 731, 767 n.2 (1982) (White, J., dissenting).

U.S. Const. art. I, § 5, cl. 2. This substantial authority of the House of Representatives (and the Senate) confers the power to establish rules for internal governance and must be broadly construed: subject only to clear constitutional limitations, that power is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). What this means is that the House has virtually unquestionable authority to decide what activities constitute internal legislative matters, and to regulate, manage, or oversee those matters as it sees fit—whether through rules, committees, or by any other method.

Pursuant to this constitutional authority, the House Rules confer upon the Committee on House Administration jurisdiction over internal support services, "including the House Restaurant."[9] The House Administration Committee also exercises jurisdiction over all "employment of persons by the House . . . ."[10] In turn, Committee rules vest jurisdiction over "restaurant facilities" in the Subcommittee on Services—the Subcommittee in-

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[9] H.R. Rule X, cl. 1(k)(12), Rules of the House of Representatives, *reprinted in* Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 271, 97th Cong., 2d Sess. § 680a, at 354-55 (hereinafter "House Rules") (1983). Committee jurisdiction was originally conferred by H.R. Res. 988, 93rd Cong., 2d Sess., 120 Cong. Rec. 34470 (1974).

The House Restaurant was previously under the jurisdiction of the Select Committee of the House Restaurant, *see* H.R. Res. 111, 93rd Cong., 1st Sess., 119 Cong. Rec. 3680 (1973), and before that, the Committee on the House Restaurant. *See* H.R. Res. 472, 91st Cong., 1st Sess., 115 Cong. Rec. 19080 (1969).

Also included within the Committee's jurisdiction under Rule X, cl. 1(k)(12) are other "services to the House, including . . . parking facilities and administration of the House Office Buildings and of the House wing of the Capitol."

[10] H.R. Rule X, cl. 1(k)(3), House Rules § 680a, at 354.

volved in this case.[11] The lawfulness of these rules is not in question. The rules alone indicate that the House itself considers oversight of the House Restaurant to be an important legislative matter. House debates reveal that the Restaurant has long been deemed "absolutely essential for the conduct of the business of the House and for the accommodation of those who have business with the House . . . ." 6 Cannon's *Precedents of the House of Representatives* § 216 at 387 (1936). Over the past century, the House has made the Restaurant the subject of investigations, reports, and resolutions. In addition, the House has long jealously regarded its control over the Restaurant. *See, e.g.*, 5 A. Hinds' *Precedents of the House of Representatives* § 7244 at 1089-91 (1907).[12] Furthermore, management of the House Restaurant has been the subject of legislation. For instance, at one time the House enacted a law placing the Restaurant under the management and direction of the Architect of the Capitol. 40 U.S.C. § 174k(a) (1976).[13] In addition, the

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[11] Rule 16(a), Rules of Procedure of the Committee on House Administration (adopted January 29, 1981), *reprinted in* Rules Adopted by the Committees of the House of Representatives, 97th Cong., 1st Sess. 133 (1981).

[12] Debates discussing Page v. District of Columbia, 20 App. D.C. 469, 474-75 (D.C. Cir. 1902), invalidating the convictions of the Senate and House restaurant managers for violations of the local liquor excise law, on the grounds that the law did not apply to the legislative restaurants, because those facilities were under the exclusive control of the respective Houses and their committees.

[13] Pub. L. 76-812, ch. 780, § 208(a), 54 Stat. 1056 (Oct. 9, 1940), "authorized and directed" the Architect "to carry into effect" for the House the following resolution:

> [T]he *management of the House restaurant and all matters connected therewith shall be under the direction of the Architect* of the United States Capitol under such rules and regulations as he may prescribe for the operation and the employment of necessary assistance for the conduct of said restaurant by such business methods as may pro-

House by statute established a revolving fund to finance the Restaurant. 40 U.S.C. § 174k(b) (1976). The House (and the Senate) will be surprised to learn that, in the opinion of this Court, none of these substantial activities are within its legislative sphere.

The majority simplistically views legislative activity as that which directly "relat[es] to the process of making laws," Majority Opinion at 13, or "work that significantly informs or influences the shaping of our nation's laws." *Id.* at 14. It can be conceded that these definitions, taken in the abstract, are semantically plausible. In practice, however, and particularly for Speech or Debate purposes, the majority's definitions are too restrictive. Congress *necessarily* acts in a number of capacities: lawgiver, proprietor,[14] overseer, and investigator, to name a few. These varying functions are related: oversight and investigation, for instance, often lead to law-making. Because the Constitution contemplates that the national *legislature* will engage in each of these activities, and because the Congress does so, these activities are *legislative*. The House of Representatives' exercise of its constitutional authority over its own internal matters, including restaurant services, is no less legislative in nature. Indeed, in my opinion a strong general rule exists that decisions relating to any subject that one House entrusts in its rules on a regular basis to a committee should be considered legislative.[15] This rule is essential to the necessary day-to-day workings of Congress and

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duce the best results consistent with economical and modern management.

H.R. Res. 590, 76th Cong., 3rd Sess., 86 Cong. Rec. 11532 (1940) (emphasis added).

[14] *See* U.S. Const. art. IV, § 3; United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

[15] *See* McSurely v. McClellan, 553 F.2d 1277, 1296 (D.C. Cir. 1976) (en banc); United States v. Dowdy, 479 F.2d 213, 226 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973).

is directly related to its efficient operation. It must be recognized that Congress knows its own business better than this Court does. The House knows what is necessary for it to function officially and efficiently as a legislative body. Congress serves as an open host to our nation. Every citizen has a constitutional right to appear and petition Congress, and out of practical necessity Congress has found it necessary to provide services for such citizens, its own staff, and itself.[16] Like an army, Congress and its employees must eat, and that function is best accomplished nearby.

In contrast to the overly restrictive view of the majority, the position outlined above is fully consistent with controlling Supreme Court decisions. Probably the best general definition of Speech or Debate remains that of *Kilbourn v. Thompson*, 103 U.S. 168 (1881): immunity attaches to all "things generally done in a session of the House by one of its members in relation to the business before it." *Id.* at 204-05. More recently the Court has explained that in order to be protected, conduct

> must be an integral part of the *deliberative and communicative processes* by which Members participate *in committee* and House *proceedings* with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*

Gravel, supra, 408 U.S. at 625 (emphasis added). It is the last clause that has significance for this case. The majority's feeble effort to limit the *Gravel* Court's pronouncement by splicing the words "of state" into the clause immediately following the reference to "other mat-

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[16] These services include, *inter alia*, the employment of Capitol police to furnish security, direct traffic and parking, and control access to buildings, and the services of elevator operators, guides, door tenders, custodial help, and restaurant managers and employees.

ters," Majority Opinion at 4, does not succeed. Just as the Constitution vests the Congress with jurisdiction over interstate commerce and impeachments, it vests the House with jurisdiction over its own internal affairs. Confirmation of this broad reading of the Court's reference to "other matters" is found in *Brewster, supra,* in which the Supreme Court held that immunity attaches to how a Member speaks, debates, or votes, and indeed to "*anything* he [does] in the chamber or in committee . . . ." 408 U.S. at 526 (emphasis added).

Applying the Supreme Court's tests to the case at bar, it is clear—no matter what else may be said—that oversight of the House Restaurant, including of *plaintiff's employment as the General Manager thereof, was "business before" the House Subcommittee on Services.* This Court is possessed of no standard by which to rule otherwise. The subject was under consideration pursuant to the rules of the House.[17] The question whether this business was law-making of national import simply does not arise. It is just as much the business of the House to oversee the operation of its Restaurant as it is to approve legislation of general applicability, or to establish adequate security personnel and oversee the operation of the

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[17] The entire structure of House oversight over its Restaurant makes the case for immunity here *stronger* than in *Davis v. Passman, supra,* a suit brought by an ex-deputy administrative aide against the Member who appointed her. In this case, the House as an institution exercises oversight over its own creature, the Restaurant. Thus personnel decisions relating to the Restaurant, when attended to by the Subcommittee, are made "business before" the House. By comparison, the House as an institution cannot be expected to exercise regular control over personnel attached to individual Members. Thus the majority wrongly presumes that this case is an easier case for holding against immunity than the situation presented in *Davis v. Passman. See* Majority Opinion at 13. It is not—just the converse is true.

Capitol police and other services that the House has found to be absolutely necessary to its operation.

The majority ignores, in grand fashion, the prerogative of the Congress to shape its own agenda. Indeed the categorical exclusion of oversight of necessary internal functions from the legislative sphere proves far too much. *Under the majority's theory, if the entire House had voted to dismiss the plaintiff—which it undeniably could have done, had it not chosen to delegate such matters—then each and every Member could be hauled into court to defend his or her vote.* If one were to follow the theory of the majority, the subject matter alone would render the decision non-legislative and non-immune. The result hypothesized would be plainly ridiculous, yet the decision in this case is not substantially different. This Court cannot simply decide by fiat that certain regular business of Congress, conducted under constitutional authority, is not truly "legislative" in the constitutional sense.[18] If any of defendants' alleged conduct in this case falls outside Speech or Debate immunity, it must be for some reason other than that House oversight of its Restaurant was merely internal or administrative, rather than legislative in nature.

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[18] The authority of the whole House to deal with this matter provides further reason for concluding that the subject of plaintiff's employment was not an issue lying outside the legislative sphere. Because the Subcommittee was exercising delegated authority, the House could presumably have overturned the Subcommittee decision and reinstated appellant. In addition, disciplinary steps could have been taken against the Members concerned, if discipline were warranted. *See* U.S. Const. art. I, § 5, cl. 2. Thus, at least two institutional remedies exist for the wrongful behavior of which plaintiff complains. The Supreme Court has suggested that the scope of Speech or Debate immunity is significantly determined by the effective scope of Congress' internal disciplinary process. *See Brewster, supra,* 408 U.S. at 518; L. Tribe, *American Constitutional Law* § 5-18 at 294 (1978).

B. *The Distinction Between Proceedings and Decisions in Committee and Subsequent "Execution" of the Decision to Discharge*

Because, under the Rules of the House, the Subcommittee on Services had jurisdiction over plaintiff's management of the House Restaurant, defendants are immune to the extent that their actions represent the direct outcome of votes or decisions made in committee. Thus the real question in this case is whether defendants—three of whom comprised the Subcommittee majority—can be held liable for any actions taken *outside* the Subcommittee. This Court must decide if plaintiff has sufficiently alleged such acts. In asserting their immunity, defendants have steadfastly maintained that their decision to fire appellant was "arrived at and effectuated 'in committee' . . . ." Brief for Appellees at 10.

The majority treats the defendants' argument as entirely misguided, but in my view, several aspects of the majority's analysis are not supported by the record. First, as a factual matter, the majority opinion proclaims that plaintiff "does not center her case on any vote, resolution, hearing, report, or proceeding in the House or a committee or subcommittee thereof." Majority Opinion at 15. This is *not* an accurate and complete reading of the complaint. To the contrary, substantial allegations of the complaint assert the following:

> Defendants Mollohan and Coyne, together with Defendant Jones as Chairman, *constituted and now constitute a majority* of the Subcommittee on Services of the House Committee on Administration and as such were and are able to control the acts, practices and functions of the Subcommittee including the wrongful discharge of plaintiff.
>
> Defendants Mollohan and Coyne *relinquished their authority to participate in the hiring and firing practices of the Subcommittee, including specifically such authority as it related to plaintiff, and delegated*

> *such authority* to Defendants Jones and Marshall *with knowledge that Defendants Jones and Marshall intended to discharge Plaintiff.* Defendants subsequently refused to take action to revoke or nullify the wrongful discharge of plaintiff.
>
> The discharge of plaintiff and the refusal to revoke or nullify such discharge occurred *despite the objections of the other members of the Subcommittee not named as Defendants herein.*

Complaint ¶ 17 (JA 12-13) (emphasis added). In respect to at least this passage, the target of the complaint is the *decision of the majority* of the Subcommittee to discharge plaintiff, over the dissent of two Members not named as defendants. In essence, these very allegations pit the Subcommittee majority against the minority. Insofar as the decision to fire plaintiff is concerned, her complaint must be construed as alleging that it took place in committee.[19] The knowledgeable delegation "to

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[19] Defendants—the Subcommittee majority—have maintained that the "delegation" of which plaintiff complains occurred at a Subcommittee meeting on May 26, 1982, held in executive session. *See* Motion to Dismiss at 3-4 (JA 29-30). The complaint is entirely consistent with that account, and the opposition to the motion to dismiss did not contest the point. *See* Plaintiff's Opposition to Motion to Dismiss at 14-15 (JA 117-18). Upon the complaint and defendants' motion, the district court found that as a result of this meeting, "[s]ubsequent to May 26, 1982, the Subcommittee delegated full authority to hire and fire employees within the jurisdiction of the Subcommittee to Chairman Jones." Walker v. Jones, 557 F. Supp. 366, 367 (D.D.C. 1983). I perceive no flaw in that finding.

Relative to the alleged meeting of May 26, 1982, the majority, *see* Majority Opinion at 6-7 & n.5, brushes aside defendants' reliance on a one-page document indicating the meeting of the Subcommittee in *executive session* on the date in question. (*See* JA 63). Given the broad sweep of plaintiff's allegations concerning the delegation of authority by the majority of the Subcommittee, at this point in this case little turns on the exact scope of the May 26, 1982, meeting. Further, in one

hire and fire" the plaintiff was tantamount to a specific decision by a majority of the committee to "fire" her. She had already been "hired" some years before. When

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sense what happened *within* the Subcommittee meeting is secondary. As this opinion has previously indicated, if plaintiff is to recover at all in this suit, it must be for conduct of defendants lying *outside* the Subcommittee's deliberations and decisions. Nonetheless, I feel constrained to comment upon the majority's out-of-hand rejection of the Subcommittee's showing, which may have some bearing on the case upon remand. In my view, that rejection fails to accord to the House the respect due to it from this Court.

One of the important provisions of Article I provides:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, *excepting such Parts as may in their Judgment require Secrecy*; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

U.S. Const. art. I, § 5, cl. 3 (emphasis added). The italicized clause quite obviously amounts to a textual commitment of an issue to a coordinate branch of government. Consistent with a general duty to keep the nation informed of its proceedings, each House has discretion to conduct business in secret, *i.e.*, in executive session, when circumstances and prudence in its judgment so require. In exercise of its constitutionally granted discretion, the House has provided that all meetings concerning "internal budget or *personnel matters*" are to be closed, or held in "executive session" as such meetings have traditionally been known. H.R. Rule XI, cl. 2(g)(1), House Rules, *supra*, § 708 at 413-14 (emphasis added); *see also* H.R. Rule XI, cl. 1(a)(1), (2), House Rules, *supra*, § 703a at 405 ("The Rules of the House are the rules of its committees and subcommittees so far as applicable."). Thus contrary to the veiled suggestions of the majority, there is nothing irregular in the slightest about conducting business of the Subcommittee in executive session, or concerning the brief public record thereof. This was not a "smokescreen," as plaintiff would have this Court believe. *See* Brief for Appellant at 17. The majority suggests that the Subcommittee, like any other organization, must offer ordinary proof of the events that transpired that

the majority of the committee acted she was effectively "fired." Contrary to plaintiff's theory of this case,[20] allegations of bad faith or ill motive cannot strip Members' actions taken in committee of their legislative immunity. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508-09 (1975); *United States v. Johnson, supra*, 383 U.S. at 180.

In reversing the trial court's decision upholding the immunity of defendants Jones and Marshall, the majority also reasons that plaintiff "dominantly charges illegal conduct beyond the protection of the Speech or Debate Clause—the carrying out or execution of a constitutionally flawed decision." Majority Opinion at 15; *see id.* at 14-17. While I am not prepared to agree that the allegations of illegal execution are the "dominant" part of the complaint, one must agree with the majority's distinction between whatever happened in committee and subsequent acts executing the Subcommittee decision. Indeed in my opinion that distinction gives rise to the only substantial immunity issue in this case.

After *Gravel*, many of the Supreme Court decisions concerning Speech or Debate immunity must be understood in terms of the distinction between a legislative decision and the subsequent execution thereof. *See*

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day if a court is to accept its version of those events. That approach fails to acknowledge the Article I, section 5 prerogative of the House, and is discordant with the underlying scheme of separation of powers. At best, the majority would put the Subcommittee majority (the defendants in this case) to a Hobson's choice between abandoning one or the other of two constitutional privileges—their power to conduct certain business in executive session, and their Speech or Debate immunity.

[20] *See* Plaintiff's Opposition to the Motion to Dismiss at 14-16 (JA 117-19); Brief for Appellant at 17.

Gravel, *supra*, 408 U.S. at 618-21 (explaining prior decisions). Ministerial steps taken subsequent to a legislative action are not immune merely because they relate to the underlying decision. In addition, *Gravel* makes it equally clear that for purposes of the decision-execution distinction, the actions of legislators and their high personal aides are treated identically. *Id.* at 618, 621. My quarrel here with the majority is not over its abstract reading of this doctrinal distinction, but with its substantial misapplications of the distinction to this case.

Let us first take defendants Representatives Mollohan and Coyne. Plaintiff alleges only that these two: 1) delegated their authority, as part of a working majority of the Subcommittee, to Representative Jones to decide whether to dismiss plaintiff, *with knowledge* of the Chairman's intent to discharge the plaintiff; and 2) failed to take steps to reinstate plaintiff once she was fired. Both charges relate to their official conduct as Congressmen. The first allegation concerns deliberative conduct *before* the dismissal, or perhaps a straightforward majority decision to discharge. These are exactly the types of official activities protected within Speech or Debate. The second allegation concerns only non-action of a sort that could not give rise to a cognizable legal claim. To the extent that the allegations can be viewed as an assertion that Representatives Mollohan and Coyne ratified the decision of Representative Jones, such ratification must be considered to be a deliberative function. By no means can either step be viewed as "executing" an unlawful decision. Without question, in my opinion it is proper to dismiss Representatives Mollohan and Coyne from this case. They should not be harassed for official conduct within the legislative duties assigned to them and which they were elected to pursue. They never acted outside the Subcommittee.

The case concerning staff director Marshall is virtually the same. The complaint alleges that Marshall

took a role in the events leading to the decision to discharge her, and also claims that Marshall acted with Representative Jones in firing the plaintiff. Complaint ¶ 15-16 (JA 12). Yet the only *act alleged* that resembles a discharge is the letter from Subcommittee Chairman Jones. *Id.* (*see* JA 64). There is no allegation that Marshall wrote that letter, or caused Representative Jones to do so. All that plaintiff specifically alleges on the part of Marshall is the circulation of a vacancy notice several days *after* the letter was written. Such a vacancy notice, if proved, could not possibly be considered either a decision to discharge, or an act executing such a decision. Moreover, in the context of the Rule 12(b)(1) motion to dismiss and upon the record before the district court, plaintiff's initial, general allegation of Marshall's complicity was no longer controlling when the district court decided the motion. Defendants directly denied that any non-Member had taken a hand in the effectuation of the discharge. *See* Defendants' Motion to Dismiss at 19 (JA 45). In response, plaintiff's recital of facts not only failed to provide any specifics, but furthermore, did not even repeat the general allegation in the complaint that Marshall had acted in concert with Representative Jones. *See* Plaintiff's Opposition to the Motion to Dismiss at 3 (JA 106). Thus plaintiff failed to carry her burden to show that any of Marshall's involvement in the case lay outside the scope of Speech or Debate. Contrary to plaintiff's contention in the district court, Marshall cannot be made liable merely on the theory that he was the "alter ego" of Representative Jones. Plaintiff's Opposition to Motion to Dismiss at 15 (JA 118). Defendant Marshall cannot be held legally responsible for mere association with Representative Jones' role in plaintiff's discharge, for the Speech or Debate Clause immunizes deliberation and communication between legislators and their aides. Upon the record before it, the district court did not err in dismissing defendant Marshall from this suit.

Thus we are left only with Representative Jones, the alleged protagonist. The majority observes that the plaintiff "complains of Jones's execution . . . of what appellees term a legislative order." Majority Opinion at 16. The only alleged act of an even remotely "executing" character is Representative Jones' writing of a letter dated June 22, 1982, notifying plaintiff of her termination. (*See* JA 64). As to the legal effect of this letter upon Representative Jones' immunity, this case ought to be remanded to the district court for development of the facts. To that narrow extent, I agree with the majority's remand of this case. The writing of the letter has not been denied. Upon the murky and incomplete record in this case at its present stage, however, the legal effect of Representative Jones' letter is a speculative matter. Neither the trial court nor this Court knows enough about how that letter fits into the chain of events preceding appellant's discharge to decide whether the Chairman's writing of the letter was, in itself, an "execution" of the Subcommittee's decision to dismiss Walker. To the extent the majority implies, upon the record before this Court, that the district court would be bound to regard the letter as an "executing" act within the sense of Speech or Debate doctrine, I must dissent. That question should be left open for the district court to decide in the first instance, after fuller development of the relevant facts.

Several factors weigh against this Court's apparent conclusion that Representative Jones' letter could constitute an "executing" act *outside* the scope of his Speech or Debate immunity. Although the Supreme Court has indicated that legislators and legislative aides are treated identically for immunity purposes, the Court has never *actually* held a legislator's acts non-immune because of their "executing" nature.[21] The reason for this is ob-

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[21] The majority recognizes this point. *See* Majority Opinion at 16 n.11.

vious: the distinction between legislative and executing acts is almost always paralleled by the division of labor between legislators and legislative aides. Members of Congress and Congressional committees quite sensibly assign ministerial tasks to aides. In general, a court should presume that Congress has organized its functional structure along such lines, and thus that acts regularly performed by Members are "legislative" in nature. This position finds support in the Supreme Court's holding in *Kilbourn*, *supra*, immunizing all acts "generally done" by Members in relation to pending business. As *Gravel* indicates, there may be irregular or aberational instances—for instance, when a Member *personally* carries out an illegal arrest, or conducts an unlawful search. *See* 408 U.S. at 621. In my opinion, however, a court should hesitate before reaching the unusual conclusion that a Member has taken upon himself the ministerial role of executing a legislative decision. One relevant factual consideration in this case, then, is whether Representative Jones' sending a letter to the plaintiff—the senior manager of the Restaurant who reported directly to the Subcommittee—notifying her of her dismissal (which was based upon the action of the Subcommittee) was irregular in any sense, or whether subcommittee chairmen normally notify such higher legislative employees of such personnel decisions.

Particularly if the letter was not irregular, then the majority cuts the decision-execution distinction far too thinly. Congress does not operate in a vacuum; its decisions must be communicated through some institutional channels in order to have any effect. That form of communication alone cannot be viewed as outside the legislative sphere, or else Speech or Debate immunity would evaporate entirely. The Supreme Court has recognized as much. In *Eastland v. United States Servicemen's Fund*, *supra*, Senator Eastland was held *immune* from suit for having signed a subpoena that allegedly infringed respondents' rights in a substantial way. *See* 421 U.S.

at 494, 503-07.[22] The Supreme Court has not distinguished as finely as does this Court today between a legislative decision and the communication thereof.[23] Thus in my mind, it remains an open question—for decision upon a fuller factual record—whether Representative Jones' letter was protected as the internal communication of a legislative decision, or whether it was an act "executing" that decision.

Another important and related question is whether other officials—persons not named as defendants in this suit—were involved in "executing" the decision to terminate the plaintiff. We know, for instance, that at one time the Architect of the Capitol was responsible for direct management of the House Restaurant. *See supra* note 13. In a case remarkably similar to that at bar, the Architect was held non-immune for having executed the dismissal of a plaintiff, while defendant legislators were held immune. *See Parker v. Allen*, Civ. A. No. 74-1846, slip op. (D.D.C. June 6, 1975) (suit by Senate Restaurant head waiter). Furthermore, a copy of Representative Jones' letter, signed as "Chairman," was directed to the "Administrative Officer," (JA 64) possibly indicating the need for further ministerial steps in the discharge of appellant. If such an official had direct re-

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[22] Similarly, in *Powell v. McCormack, supra*, the Court held legislators immune from liability on the basis of resolutions, recorded in the Congressional Record, that had the effect of excluding Representative Powell from the House. *See* 395 U.S. at 490, 492-93, 506.

[23] The majority's apparent willingness to entertain the possibility that the mere writing of a letter to a dismissed employee is an act "executing" the decision to dismiss, and thus breaches immunity that would otherwise attach to the underlying decision, seems overly facile. If such were the case, then it is difficult to see why the *Davis v. Passman* Court avoided the question of Speech or Debate immunity. *See* 442 U.S. at 235-36 n.11. That case also involved a discharge letter. *See id.* at 230-31 n.3.

sponsibility for terminating plaintiff in this case, then Representative Jones' letter must be viewed in a way quite different from that which the majority indicates. If plaintiff could have sued such an official, then resolution of the conflict between allowing for judicial review of an allegedly unlawful act and protecting legislators from harassment would have been made considerably easier. Applying this analysis, the Supreme Court has indicated that as a pragmatic matter, the availability of redress against legislative aides rather than Members can provide reason for excusing legislators from suit. *See Powell v. McCormack, supra,* 395 U.S. at 505-06 & n.26. That being the case, the *potential* availability of such defendants becomes important. Plaintiff's failure to name such officials could be fatal to her case: a legislator who would otherwise be immune should not be kept in a case merely because the plaintiff has failed to pursue appropriate avenues of redress.

For the foregoing reasons, any immunity ruling as to Representative Jones' acts after the decision to dismiss was reached should be made by a court on a complete record of the events. In my view this case should be remanded to the district court for such an inquiry,[24] and the decision of the district court should be affirmed in all other respects.[25] To the extent that the majority opinion differs from the foregoing discussion, I respectfully dissent.

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[24] In addition, the district court must determine whether the allegedly false (and apparently defamatory) statements by Representative Jones— the circumstances of which remain a mystery—were made at all or were made under immune circumstances. *See* Hutchinson v. Proxmire, 443 U.S. 111, 123-33 (1979).

[25] It should also be noted that under the logic of Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979), this Court's decision denying the two defendants' immunity is immediately reviewable in the Supreme Court; defendants need not await trial and judgment in order to seek review.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed February 15, 1983

Clerk, U.S. District Court, District of Columbia

Civil Action No. 82-2723

ANNE W. WALKER, PLAINTIFF

v.

HONORABLE ED JONES, ET AL., DEFENDANTS

MEMORANDUM

Anne W. Walker brings this action for declaratory and injunctive relief, reinstatement, and damages due to her alleged wrongful discharge from her job as general manager of the restaurant system of the United States House of Representatives. Defendants in this case are The Honorable Ed Jones, Chairman of the Subcommittee on Services of the Committee on House Administration; The Honorable Robert H. Mollohan and The Honorable James K. Coyne, members of the Subcommittee on Services; and Thomas D. Marshall, staff director of the Subcommittee on Services. The action is before the Court on defendants' motion to dismiss.

The Subcommittee on Services of the Committee on House Administration (the Subcommittee), among other duties, is responsible for the administration of the House Restaurant System. This system provides food services for Members of the House of Representatives, their guests, and House employees. As part of its administration of the restaurant system, the Subcommittee is responsible for hiring and firing restaurant employees. Subsequent to May 26, 1982, the Subcommittee delegated full authority

to hire and fire employees within the jurisdiction of the Subcommittee to Chairman Jones.

Anne Walker was employed as general manager of the House Restaurant System from approximately December, 1970, until June 30, 1982. Walker alleges that she was discharged because of her sex, in violation of the Fifth Amendment of the United States Constitution. She also alleges that Chairman Jones made untrue public statements indicating that she was fired because she was an inefficient manager and had been improperly "skimming" restaurant funds for her own use. The Complaint which began this action was filed on September 23, 1982.

Walker's Complaint contains five counts. The basis for relief asserted in each count is the alleged unlawful discharge of Walker from her job as general manager of the House Restaurant System. In their motion to dismiss, defendants argue, *inter alia*, that Chairman Jones' discharge of Walker from her job cannot be the basis for defendants' liability because the discharge was an action within the legislative sphere protected by the Speech and Debate Clause of the United States Constitution, Article I, § 6.

The Speech and Debate Clause states that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." Article I § 6, clause 1. As interpreted by the courts, the Speech and Debate Clause protects Members of Congress from being sued for their actions within the "legislative sphere." *See, e.g., United States v. Brewster*, 408 U.S. 501, 526 (1972); *Gravel v. United States*, 408 U.S. 606 (1972). In addition, congressional staff members are immune from suit if their actions would be protected under the Speech and Debate Clause if performed by Congressmen. *See Gravel v. United States*, 408 U.S. at 616-617. Walker's suit is based on Chairman Jones' action, pursuant to authority granted by the Subcommittee, discharging Walker from her job. If this action is within the legislative sphere, therefore, the case must be dismissed as to all defendants.

The Speech and Debate Clause is to be interpreted "broadly to effectuate its purposes." *Eastland v. United States Servicemen's Fund*, 421 U.S 491, 501 (1975) Accordingly, courts have extended the protection of the clause beyond literal speech and debate and beyond actual lawmaking activity. Actions relating to the internal administration of Congress have been found to be protected legislative acts. For example, the seating of the press in the House and Senate galleries, *Consumers Union of the United States, Inc. v. Periodical Correspondents Association*, 515, F.2d 1341 (D.C. Cir. 1975), *cert. den.* 423 U.S. 1501 (1976), and the committee assignments by party caucuses, *Vander Jagt. v. O'Neill*, 524 F. Supp. 519 (D.D.C. 1981) *appeal pending*, No. 81-1722 (D.C. Cir. argued March 19, 1982), have been found to be legislative action protected by the Speech and Debate Clause. In addition, this District Court has previously held that the administration of a congressional restaurant "while it may not attain to the magnitude of some congressional duties, is clearly an activity which is within the 'legislative sphere'." *Parker v. Allen*, et al., No. 74-1846, slip op. at 9 (D.D.C. June 6, 1975).

The cases cited indicate that the actions of Congress in making "internal arrangements for its own necessities" are within the "legislative sphere." *Id.* Accordingly, the Court finds that Chairman Jones' discharge of a House Restaurant employee, pursuant to authority granted by a congressional subcommittee, is an action within the "legislative sphere." Under the Speech and Debate Clause of the United States Constitution, therefore, the Chairman, Members and staff of the Subcommittee may not be held for Walker's discharge.

For these reasons, defendants' motion to dismiss is granted.

An appropriate Order follows:

JOHN LEWIS SMITH, JR.,
United States District Judge.

Dated: February 14, 1983.

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed February 15, 1983

Clerk, U.S. District Court, District of Columbia

Civil Action No. 82-2723

ANNE W. WALKER, PLAINTIFF

v.

HONORABLE ED JONES, ET AL., DEFENDANTS

ORDER

Upon consideration of the motion to dismiss filed by defendants Chairman Ed Jones, Congressmen Robert Mollohan and James Coyne, and Thomas Marshall, and the opposition thereto, it is hereby

ORDERED that the motion to dismiss is granted, and it is further

ORDERED that the action is dismissed.

JOHN LEWIS SMITH, JR.,
United States District Judge.

Dated: February 14, 1983.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 82-02723

United States Court of Appeals for the District of Columbia Circuit

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Filed July 5, 1984, George A. Fisher, Clerk,

No. 83-1425

ANNE W. WALKER, APPELLANT

v.

HONORABLE ED JONES,

CONGRESSMAN OF THE UNITED STATES OF AMERICA

BEFORE: Wilkey and Ginsburg, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of the House Appellees filed June 15, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For the Court:
GEORGE A FISHER,
Clerk.

By: ROBERT A. BONNER,
Chief Deputy Clerk.

Senior Circuit Judge MacKinnon would Grant the Petition for Rehearing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 82-02723

United States Court of Appeals for the District of Columbia Circuit

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Filed July 5, 1984, George A. Fisher, Clerk,

No. 83-1425

ANNE W. WALKER, APPELLANT

v.

HONORABLE ED JONES,

CONGRESSMAN OF THE UNITED STATES OF AMERICA

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of the House Appellees, filed June 15, 1984, has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam
For the Court:
GEORGE A FISHER,
Clerk.

By: ROBERT A. BONNER,
Chief Deputy Clerk.

APPENDIX D

In The United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Actions No. 82-2723

Filed September 23, 1982, James F. Davey, Clerk

ANNE W. WALKER

4001 IVANHOE LANE, ALEXANDRIA, VIRGINIA 22310 (703) 960-3587, PLAINTIFF

v.

HONORABLE ED JONES

Congressman of the United States and Chairman, Subcommittee on Services of the Committee on House Administration, U.S. House of Representatives, Room 108, Cannon House Office Building, Washington, D.C. 20515

and

HONORABLE ROBERT H. MOLLOHAN

Congressman of the United States and Member, Subcommittee on Services of the Committee on House Administration, U.S. House of Representatives, Room 339, Cannon House Office Building, Washington, D.C. 20515

and

HONORABLE JAMES K. COYNE

Congressman of the United States and Member, Subcommittee on Services of the Committee on House Administration, U.S. House of Representatives, Room 1513, Longworth House Office Building, Washington, D.C. 20515 .

and

THOMAS B. MARSHALL

Staff Director, Subcommittee on Services, Committee on House Administration, U.S. House of Representatives, Room 105, Cannon House Office Building, Washington, D.C. 20515

DEFENDANTS

COMPLAINT

(For Delaratory Judgment, Injunctive Relief and Damages)

JURISDICTION

1. Jurisdiction in this action is invoked pursuant to 28 U.S. Code §1331, 28 U.S. Code §1332, 28 U.S. Code §1361, and 28 U.S. Code §2201, 2202. To the extent that the above captioned statutes do not confer jurisdiction over any matter alleged herein, the court has pendent jurisdiction.

Jurisdiction is founded on amount and the existence of a Federal question arising under the Fifth Amendment to the Constitution of the United States, as more fully set forth hereinafter. Jurisdiction is also founded on amount and true diversity of citizenship, as more fully set forth hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

PARTIES

2. Plaintiff Anne W. Walker, an adult female is a citizen of the United States and a resident of the Commonwealth of Virginia.

3. Defendant Ed Jones is a citizen of the United States and a resident of the State of Tennessee.

Defendant Ed Jones is and, at all times hereinafter complained of was, a member of the House of Representatives of the Congress of the United States. Defendant Ed Jones is, and at the times hereinafter complained of was, Chairman of the Subcommittee on Services of the Committee on House Administration of the United States House of Representatives.

Defendant Ed Jones is sued for damages and declaratory and injunctive relief individually and in his official capacity.

4. Defendant Robert H. Mollohan is a citizen of the United States and a resident of the State of West Virginia. Defendant Robert H. Mollohan is, and at the times herein complained of was, a member of the House of Representatives of the Congress of the United States.

Defendant Robert H. Mollohan is, and at all times herein complained of was, a member of the Subcommittee on Services of the Committee on House Administration of the United States House of Representatives.

Defendant Rebert H. Mollohan is sued for damages and declaratory and injunctive relief individually and in his official capacity.

5. Defendant James K. Coyne is a citizen of the United States and a resident of the Commonwealth of Pennsylvania. Defendant James K. Coyne is, and at the times herein complained of was, a member of the House of Representatives of the Congress of the United States.

Defendant James K. Coyne is, and at all times herein complained of was, a member of the Subcommittee on Services of the Committee on House Administration of the United States House of Representatives.

Defendant James K. Coyne is sued for damages and declaratory and injunctive relief individually and in his official capacity.

6. Defendant Thomas B. Marshall is, and at all times complained of was, a citizen of the the United States and

a resident of the State of Mississippi. Defendant Thomas B. Marshall is and at the times hereinafter complained of was, staff director of the Subcommittee on Services of the Committee on House Administration of the United States House of Representatives. Defendant Thomas B. Marshall is sued for damages and declaratory and injunctive relief individually and in his official capacity.

ALLEGATIONS

7. In December, 1970, plaintiff was hired by the Subcommittee on Services (hereinafter Subcommittee) of the Committee on House Administration of the U.S. House of Representatives to manage the Longworth Cafeteria and Carry Out, a Congressionally owned cafeteria and food carry out service, operated by said Subcommittee.

8. At the time of her employment by the Subcommittee, plaintiff had substantial experience and training in management and operation of food service establishments of the type to which she was assigned during her service with the Subcommittee and was well qualified to perform the duties to which she was assigned at that times or thereafter.

9. As a result of conversations and communications with the Chairman and other Subcommittee members and Subcommittee Staff members at the time of her employment and throughout her employment and as a result of the well known personnel policies of the Subcommittee, plaintiff was led to believe and did believe that, so long as her duties were performed in a proper, efficient and professional manner, her employment was permanent and would continue.

Plaintiff also understood from observation of and experience with the employment practices of the Subcommittee and other Congressional committees and Subcommittees that, as a person not involved in the legislation process, her employment was permanent and would continue so long as her duties were performed in a proper, efficient and professional manner. Plaintiff did rely on such understanding, observations and belief.

Plaintiff at all times during her tenure with the Subcommittee performed her duties in a proper, efficient and professional manner. Throughout the period of her tenure plaintiff was at all times lead to believe and understood that her performance was at all times satisfactory.

10. Shortly after the date of her employment plaintiff was appointed General Manager of the House Restaurant System (hereinafter System) which System consisted of all the food service facilities operated by the House of Representatives except the members and staff dining rooms in the Capitol Building. Plaintiff's duties as General Manager of the House Restaurant System consisted of complete authority to operate the System and to take all actions necessary for such operation. Plaintiff's duties did not consist of the performance of legislative functions.

11. At the time that plaintiff became General Manager of the House of Representatives Restaurant System, said System was operating at a loss. As manager of such System for a period of approximately ten years, plaintiff operated such system in a proper, efficient and professional manner and was able to show a net profit for such System during that period in excess of Three Million ($3,000,000) Dollars.

12. During plaintiff's tenure as General Manager of the House of Representatives Restaurant System, Defendant Ed Jones became, and now is, Chairman of the Subcommittee. During such period Defendant Thomas B. Marshall became, and now is, Staff Director of the aforesaid Subcommittee. Defendant Jones as Chairman of the aforesaid Subcommittee and Defendant Marshall as Staff Director for the aforesaid Subcommittee exercised and were authorized by the Subcommittee to exercise managerial and control functions over the employees of the Subcommittee, including plaintiff, from the date of assuming their respective functions until the present.

13. Early in 1982, Defendant Jones indicated to others that because of plaintiff's sex she was overpaid and that

her salary was "ridiculous for a woman." Such statements were repeated to staff members by Defendant Marshall.

14. After Defendant Ed Jones became Chairman of the Subcommittee and responsible for the House Restaurant system he allowed plaintiff to manage, control and operate said system without intervention or criticism. During 1980, Defendant Jones indicated approval of Plaintiff's services and informed her that he was increasing her salary by Eight Thousand ($8,000.00) Dollars per annum to Forty Five Thousand ($45,000.00) Dollars per annum because of the efficient way she operated said system. Plaintiff's salary was increased as indicated. During the period in which Defendant Marshall was Staff Director of the Subcommittee or in other positions of authority with said Subcommittee he permitted plaintiff to manage, control and operate said System without intervention or criticism.

15. On May 21, 1982, plaintiff directed a letter to Defendant Jones with copies to the other Subcommittee members requesting a meeting with him or other members of the Subcommittee to discuss her duties and her position. A meeting was held shortly thereafter between Defendant Jones, Defendant Marshall and plaintiff, at which time plaintiff detailed her operations and profit structure. Defendants Jones and Marshall made no comment and expressed no dissatisfaction with plaintiff's performance. Said meeting thereafter concluded without criticism of plaintiff.

16. During June 1982, Defendants Jones and Marshall discharged plaintiff from employment with the Subcommittee.

On June 22, 1982, Defendant Jones directed a letter to plaintiff on Subcommittee letterhead as Chairman of the Subcommittee stating in part "It is with regrets that I must terminate your employment as General Manager of the House Restaurant System effective June 30, 1982". . . as "best for the future of the Restaurant System". . .

"Sincerely yours, Ed Jones, Chairman." On June 25, 1982 Defendant Marshall circulated a memorandum to "All Managers and Department Heads" stating in part that "Effective Saturday morning, June 26, the office of General Manager of the House Restaurant System will be vacated."

17. Defendants Mollohan and Coyne, together with Defendant Jones as Chairman, constituted and now constitute a majority of the Subcommittee on Services of the House Committee on Administration and as such were and are able to control the acts, practices and functions of the Subcommittee including the wrongful discharge of plaintiff.

Defendants Mollohan and Coyne relinquished their authority to participate in the hiring and firing practices of the Subcommittee, including specifically such authority as it related to plaintiff, and delegated such authority to Defendants Jones and Marshall with knowledge that Defendants Jones and Marshall intended to discharge Plaintiff. Defendants subsequently refused to take action to revoke or nullify the wrongful discharge of plaintiff.

The discharge of plaintiff and the refusal to revoke or nullify such discharge occurred despite the objections of the other members of the Subcommittee not named as Defendants herein.

18. During the month of July, 1982, the position of General Manager of the House Restaurant System formerly occupied by plaintiff was filled by Defendants Jones and Marshall with a male person.

19. After plaintiff's discharge, Defendant Jones made public statements and representations, contrary to fact, that plaintiff's discharge was based on the operation of the System inefficiently and at a loss. Defendant Jones also made statements, contrary to fact, that plaintiff was guilty of improper and/or illegal bookkeeping practices and had engaged in misappropriation and "skimming" of funds from the System. In truth and fact said System was at all times operated efficiently, properly, legally and at a

profit with the full knowledge of Defendants. The statements and allegations as to alleged inefficiency, misappropriation and "skimming" of funds and all other similar allegations of Defendant Jones were at all times known by him to be untrue.

20. As a result of the actions and conduct of Defendants, plaintiff lost her position with the Federal Government, suffered great financial and other losses including loss of salary, retirement benefits, health benefits and additional benefits enuring from her employment.

21. As a result of the actions and conduct of Defendants, plaintiff has suffered great physical and emotional harm, including illness, excessive stress, loss of sleep, pain and suffering. Plaintiff's reputation has been permanently damaged and she has been held up to ridicule and embarassment in the community. She has been unable to obtain other employment of a comparable nature and salary.

COUNT I

22. Paragraphs 1 through 21 are hereby realleged.

23. Plaintiff entered into a contract of employment with the aforesaid Subcommittee to perform services as heretofore alleged for such Subcommittee.

24. Defendants terminated and/or caused or permitted the termination of plaintiff's employment on the basis that she was a female despite the fact that plaintiff performed and is now ready, willing and able to perform all of her duties in an efficient, proper and professional manner.

25. The conduct of Defendants was arbitrary, capricious and unlawful, and discriminated and continues to discriminate against plaintiff on the basis of her sex in violation of the Fifth Amendment of the Constitution of the United States. Plaintiff was damaged as hereinbefore alleged and is entitled to compensatory and punitive damages and other relief as herein sought.

COUNT II

26. Counts 1 through 21 are hereby realleged.

27. Plaintiff entered into a contract of employment to perform services for said Subcommittee as heretofore alleged. Under such contract, plaintiff's employment was to continue so long as she performed the duties to which she was assigned in a proper, efficient and professional manner. Plaintiff at all times performed and is now ready, willing and able to perform, all of her duties in a proper, efficient and professional manner.

28. Defendants wrongfully discharged and/or caused or permitted the discharge of plaintiff. Plaintiff was thereby deprived of substantial personal and property rights and of due process and equal protection in violation of the Fifth Amendment of the Constitution of the United States. Plaintiff was damaged as hereinbefore alleged and is entitled to compensatory and punitive damages and other relief as herein sought.

COUNT III

29. Paragraph 1 through 21 hereby are realleged.

30. Plaintiff was employed by the aforesaid Subcommittee as hereinbefore alleged.

31. During the period of plaintiff's employment, she was at all times led to believe by responsible persons in authority with said Subcommittee and by the well known personnel policies of the Subcommittee that so long as she performed the duties assigned to her in a proper, professional and efficient manner her employment would continue. Plaintiff relied on said representations and policies, including representations by Defendants, continued in her employment, and at all times performed her employment functions in a proper, professional and efficient manner throughout the period of her employment.

32. Defendants wrongfully discharged and/or caused or permitted the discharge of plaintiff, without cause or notice to plaintiff and without affording plaintiff a hearing or other opportunity to be informed of or to rebut any alleged basis of her discharge. Plaintiff was thereby de-

prived of substantial personal and property rights and of due process and equal protection of the law in violation of the Fifth Amendment of the Constitution of the United States. Plaintiff was damaged as hereinbefore alleged. Plaintiff is entitled to compensatory and punitive damages and other relief as herein sought.

COUNT IV

33. Paragraphs 1 through 21 are hereby realleged.

34. Plaintiff was employed by the aforesaid Subcommittee as hereinbefore alleged.

35. The practice and policy of the various Congressional Committees and Subcommittees, including the Subcommittee on Services of the House Committee on Administration, and of personnel thereof having authority to employ and/or discharge employees not involved in the legislative process has been to only discharge such employees for valid cause and reason relating to improper or inadequate job performance.

This policy and practice has been and is understood and relied upon by employees of Congressional Committees and Subcommittees including employees of the Subcommittee on Services of the House Committee on Administration. The aforesaid policies and practices were in effect during the period of plaintiff's employment and applied to plaintiff. The aforesaid practices and policies afforded plaintiff substantial personal and property rights.

36. Defendants wrongfully discharged and/or caused or permitted the discharge of plaintiff without basis or cause and contrary to the practices and policies alleged in paragraph 35. Plaintiff was discharged without being afforded a trial, hearing or opportunity to be informed of and rebut any alleged basis for her discharge.

Plaintiff was thereby deprived of substantial personal and property rights and of due process and equal protection of the law in violation of the Fifth Amendment of the Constitution of the United States. Plaintiff was damaged as hereinbefore alleged and is entitled to compensa-

tory and punitive damages and other relief as herein sought.

COUNT V

37. Paragraphs 1 through 21 are realleged.

38. Plaintiff was employed by the aforesaid Subcommittee as hereinbefore alleged.

39. Defendants Jones and Marshall acted in concert and/or engaged in a conspiracy to wrongfully discharge plaintiff and to replace her with a male person of their choice. Defendant's Jones and Marshall engaged in willful, reckless, wanton and unlawful acts and practices and in a pattern of conduct designed to discharge or secure the discharge of plaintiff without cause and preclude potential action by subcommittee members to reverse such discharge. Defendants Mollohan and Coyne aided and abetted such acts of Defendants Jones and Marshall as hereinbefore alleged.

40. Plaintiff was deprived of substantial personal and property rights by being so discharged and by not being afforded a trial, hearing or other opportunity to be informed of, or defend against, or refute any alleged basis of her discharge. Plaintiff was thereby deprived of due process and equal protection of law in violation of the Fifth Amendment of the Constitution of the United States.

Plaintiff was damaged as hereinbefore alleged and is entitled to compensatory and punitive damages and other relief as herein sought.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court:

A. Award judgment against the Defendants and each of them, jointly and severally, for $1,000,000.00 for compensatory damages.

B. Award judgment against Defendants and each of them jointly and severally, for $3,000,000.00 for punitive damages.

C. Issue a declaratory judgment that:

(1) Plaintiff's firing was arbitrary, capricious, and otherwise unlawful and unconstitutional;

(2) Plaintiff is entitled to back pay and all other emoluments of office from the date of her discharge.

D. Grant permanent injunctive relief applicable to Defendants or to such of their official successors as are necessary to act:

(1) Reinstating plaintiff to her position as General Manager of the House Restaurant System with the salary she was receiving at the time of her discharge, all emoluments of that office and back pay from the date of her discharge.

(2) Prohibiting defendants or any of them from directly or indirectly hereinafter interfering with or infringing any of plaintiff's constitutional or statutory rights, or the discharge of her duties.

(3) Requiring defendants to provide plaintiff permanent employment as Manager of the House Restaurant System until such time as she is eligible for retirement under Retirement System for Congressional Employees and elects to retire.

E. Award interest, the costs and disbursements of this action, and reasonable attorney's fees.

F. Provide such other and further relief as the Court may deem just and proper.

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CLERK

84-529

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL.,

Petitioners,

V.

ANNE W. WALKER,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR ANNE W. WALKER

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether the Chairman, who is a member of Congress, and the Staff Director, of the House of Representatives' Subcommittee on Services of the Committee on House Administration are immune from civil liability under the Speech or Debate Clause of the Constitution for their alleged discriminatory (gender-based) and wrongful discharge of the General Manager of the House of Representatives' Restaurant System.

PARTIES INVOLVED

The parties to this Petition are the Honorable Ed Jones, Congressman and Chairman of the Subcommittee of Services, Committee on House Administration of the House of Representatives, and Thomas Marshall, the Subcommittee's former Staff Director, petitioners; and Anne W. Walker, former General Manager of the House of Representatives' Restaurant System, respondent.

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Fifth Amendment 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No. ____

HONORABLE ED JONES, CHAIRMAN OF THE SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL.,

Petitioners,

V.

ANNE W. WALKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent Anne W. Walker, former Manager of the House of Representatives' Restaurant System, through her attorneys, pray for the denial of the issuance of a writ of *certiorari* sought by petitioners, the Chairman and a former Staff Director of the House of Representatives' Subcommittee on Services, Committee on House Administration, for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 1,

1984, in favor of respondent and against petitioners in this proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1 of the Constitution of the United States of America provides in pertinent part: ". . . and for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case involves an action for damages, reinstatement, and declaratory and injunctive relief, arising out of the allegedly discriminatory (gender-based) and wrongful discharge of respondent Anne W. Walker as General Manager of the House of Representatives' Restaurant System (hereinafter, the "House Restaurant System"), in violation of her liberty and property interests and of the Equal Protection component of the Due Process Clause of the Fifth Amendment (Complaint, Paras. 20–40; Pet. App. D at 8d–11d). Facts alleged in the complaint on September 23, 1982 are summarized below.

In December 1970, Anne W. Walker was hired by the Subcommittee to manage the House Restaurant System (Complaint, Para. 7; Pet. App. D at 4d). At the time of her employment, and throughout her employment, she was led to believe that so long as her duties were performed in a proper and efficient manner, her employment would be permanent and would continue. This belief was based on well-known personnel policies of the Subcommittee, and on

Anne W. Walker's conversations and communications with the Subcommittee Chairman and with other Subcommittee members and staff of the Subcommittee to the effect that employees not involved in the legislative process are discharged only for valid cause and reason relating to improper or inadequate job performance. (Complaint, Para. 9; Pet. App. D at 4d.

Anne W. Walker was employed in various positions in the House Restaurant System for a period of approximately ten years (Complaint, Para. 11; Pet. App. at 5d). During this period she changed the financial position of the House Restaurant System from a loss to a net profit in excess of three million dollars (Complaint, Para. 11; Pet. App. at 5d); managed, controlled, and operated the House Restaurant System without intervention or criticism (Complaint, Para. 14, Pet. App. D. at 6d); and was led to believe and understand that her performance was at all times satisfactory (Complaint, Paras. 9, 14, and 15; Pet. App. D at 4d–6d). Indeed, during 1980, Chairman Jones increased the salary of Anne W. Walker by eight thousand dollars per annum to forty-five thousand dollars per annum because of the efficient manner in which she operated the House Restaurant System (Complaint, Para. 14; Pet. App. D at 6d).

In May 1982, at her request, Anne W. Walker met with Congressman Jones and Thomas Marshall, the Staff Director of the Subcommittee, at which time she detailed the operations and profit structure of the House Restaurant System. They made no comment and expressed no dissatisfaction with her performance; and, concluded the meeting without criticism. (Complaint, Para 15; Pet. App. at 6d.)

Early in 1982, Congressman Jones indicated to others that because of Anne W. Walker's sex she was overpaid and that her salary was "ridiculous for a woman" (Complaint,

Para. 13; Pet. App. D. at 5d–6d). On June 22, 1982, Congressman Jones notified Anne Walker of her discharge (Complaint, Para. 16; Pet. App. D at 6d–7d):

> It is with regrets that I must terminate your employment as general manager of the House Restaurant System effective June 30, 1982," . . . as "best for the future of the Restaurant System" . . . "Sincerely yours, Ed Jones, Chairman."

In July 1982, Congressman Jones and Staff Director Marshall hired a male person as General Manager (Complaint, Para. 18; Pet. App. D at 7d).

After Anne W. Walker's discharge, Congressman Jones made knowingly false public statements and representations that she was discharged because she (1) operated the House Restaurant System inefficiently and at a loss, (2) engaged in improper and/or illegal bookkeeping practices, and (3) engaged in misappropriation and "skimming" of funds from the House Restaurant System (Complaint, Para. 19; Pet. App. D at 7d–8d).

On February 15, 1983, the District Court dismissed the complaint in its entirety on the sole ground that "the discharge of a House Restaurant employee, pursuant to authority granted by a congressional subcommittee, is an action within the 'legislative sphere'." (Memorandum decision; Pet. App. B at 3b.) The District Court reasoned:

> Actions related to the internal administration of Congress have been found to be protected legislative acts. For example, the seating of the press in the House and Senate galleries, *Consumers Union of the United States, Inc. v. Periodical Correspondents Association*, 515 F.2d 1341 (D.C. Cir. 1975) *cert. den.* 423 U.S. 1501 (1976) . . . have been found to be legislative action

> protected by the Speech or Debate Clause. In addition, this District Court has previously held that the administration of a congressional restaurant "while it may not attain the magnitude of some congressional duties, is clearly an activity which is within the 'legislative sphere'." *Parker v. Allen*, et al., No. 74–1846, slip op. at 9 (D.D.C. June 6, 1975).
>
> The cases indicate that actions of Congress in making "internal arrangements for its own necessities" are within the "legislative sphere."

On May 1, 1984, the Court of Appeals reversed the dismissal of the complaint as to Congressman Jones and Staff Director Marshall on the ground that "personnel actions of the kind Jones and Marshall are alleged to have taken, if effected for unlawful reasons, do not fall within the legislative functions to which the absolute immunity of the Speech or Debate Clause attaches." (733 F.2d 934, Pet. App. A at 19a).[1] The Court of Appeals reasoned that food service work is not legislative in nature (733 F.2d 934; Pet. App. A. at 14a); and, that it would "demean the high purpose of the speech or debate privilege to extend it to official activities of Congress members and their aides in 'mundane fields' outside 'the legislative core.' *Davis v. Passman*, 544 F.2d 865, 880 (5 Cir. 1977); *rev'd on other grounds*, 571 F.2d 793 (5 Cir. 1978) *(en banc)*, *rev'd* 442 U.S. 228 (1979)," (733 F.2d 929; Pet. App. A at 10a.) That Court also distinguished *Consumers Union of the United States, Inc. v. Periodical Correspondents Association*, 515 F.2d 1341 (D.C. Cir. 1975), on the ground that the press seating arrangements in were

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[1]The District Court dismissed to complaint as to Congressmen Mollohan and Coyne because the "complaint attributed no actual participation in the termination of Walker's employment . . ." to them (733 F.2d 925 n.1; Pet. App. A. at 2a–3a.)

intended to shield members of Congress from press member's use of their House access to lobby legislators (733 F.2d 930; Pet. App. A at 12a)—which unquestionably relates to the legislative business of the Congress. The Court of Appeals also noted that, in *Parker v. Allen*, No. 74–1846, slip op. (D.D.C. June 6, 1975; unpublished) the District Court concluded that the Capitol Architect who actually fired the head waiter of the Senate Restaurant System was not immune from suit under the Speech or Debate Clause, and awarded the head waiter substantial relief. The Court of Appeals also held that petitioners are not immune from suit under the doctrine of absolute immunity because the scope of that doctrine "does not extend beyond the scope of the Speech or Debate Clause. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810–11 (1982); *Davis v. Passman*, 442 U.S. 228, 235 n.11, 246 (1979)." (733 F.2d 932; Pet. App. A. at 17a.)

The Court of Appeals further held that they had addressed the wrong issue with respect to qualified immunity: the question of the uncertainty of the law pertaining to the Speech or Debate Clause, rather than whether their conduct violated any "'clearly established statutory or constitutional right [of Anne W. Walker] of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. at 818; *see also id.* at 807." (733 F.2d 932, 933; Pet. App. A. at 17a–18a).

The Court of Appeals also held that the allegations of Anne W. Walker's complaint are sufficient enough so as not to be subject to be dismissed for failure to state any claim upon which relief can be granted (733 F.2d 933; Pet. App. A at 18a–19a).[2]

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[2]Petitioners do not challenge this holding.

ARGUMENT

A. This Case Does Not Present Any Important Question Involving The Relationship Between The Legislative and Judicial Branches of Government.

Petitioners assert that this case presents the question of "whether Congressional decisions[3] to dismiss senior aides are shielded by the Speech or Debate Clause." (Petition at 7.) Petitioners contend that the Supreme Court should grant *certiorari* to review this issue because it involves an important issue concerning the relationship between the legislative and judicial branches of government, the significance of which was recognized in *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) (Petition at 7–8).

For the first time, in this Court, Petitioners contend, in substance, that the subject matter of Anne C. Walker's complaint is nonjusticable because the Court of Appeals "judgment fails to accord to the House the respect that any court owes a coordinate branch of government. (Judge MacKinnon dissenting, 733 F.2d 938; Petition at 11, *see also* Petition at 7–8). Petitioners rely on that part of the dissenting opinion of Chief Justice Burger, joined by Justices Powell and Rehnquist, in *Davis v. Passman*, 442 U.S. at

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[3]There is no allegation by Anne W. Walker in the complaint or elsewhere, and no evidence of record, to support petitioners' assertion that any "Congressional decision" was made to discharge her. The complaint merely alleges that in discharging her the petitioners engaged in acts in violation of her Constitutional rights. (733 F.2d 931; Pet. App. A. 14a–15a.) Likewise, there is no evidence of record to support petitioners' claims that (1) "[a]fter consideration of the matter in executive session, the subcommittee dismissed the [so-called] committee aide who served as General Manager of the Restaurant System." (Questions Presented, Petition at (i); and (2) "[t]he specific meeting of the Subcommittee which is the subject of the complaint was conducted in executive session." (Petition at 11 n.12).

250, which states that "long-accepted concepts of separation of powers dictate . . . that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed." (Petition at 8.) However, this dissent refers only to the staffs of Members of Congress who are considered to be "intimately a part of the policymaking and political process" where there is an "imperative need for loyalty, confidentiality, and political compatibility—not simply to a political party, an institution or an administration, but to the individual Member." *Davis v. Passman*, 442 U.S. at 250.

Anne W. Walker was neither such a Congressional staff member, nor an aide, or *alter ego* to the Subcommittee.[1] As the chief food service facility manager, she was completely removed from the legislative arena. She did not work for any Member of Congress; but rather, was an employee of the Subcommittee and worked directly for the Staff Director of that Subcommittee. The Staff Director was neither a member of Congress nor an aide to any Member of Congress.

Anne W. Walker's duties and responsibilities did not involve or influence any legislative functions or activities. Her discharge as General Manager of the House Restaurant

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[1]Petitioners suggest that Anne W. Walker, as General Manager of the House Restaurant System, was an agent or officer of the House of Representatives based on the holding in *Page v. District of Columbia*, 20 U.S. App. D.C. 469, 474 (1902), that persons conducting the restaurants of the Houses of Congress are not required to take out local liquor licenses because they are *quasi* agents or officers of the Houses. (Petition at 13 n.14.) It is apparent that this type of agency does not suggest, without more, that there was a close intimate relationship between the manager of the restaurants and their employers in the matters of legislative functions and activities—one of the factual predicates needed to establish that Anne W. Walker was an aide to the Subcommittee.

System could not, therefore, materially impact on the separation of power concerns which the Petitioners seek to raise. Absent this genuine issue concerning "lack of the respect due coordinate branches of government," *Baker v. Carr*, 369 U.S. 186, 217 (1962), "judicial review of [this] Congressional employment decision[ ] is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution, Art. I, §6, cl. 1." *Davis v. Passman*, 442 U.S. at 235 n.11. Thus, the merits of the Speech or Debate issue are properly before this Court. Anne W. Walker submits that the decision of the Court of Appeals on that issue is in all respects correct for the reasons set forth in its opinion (Pet. App. A).

B. The Decision of the Court of Appeals, Denying Speech or Protection To Personnel Decisions, Does Not Decide The Question In Any Way Which Conflicts With The Decisions Of This Court.

Petitioners assert that the Court of Appeals "jettisoned" the traditional test for the invocation of the Speech or Debate Clause and "invented and applied a novel and unprecedented criterion: whether the subject of the legislative action is in a 'mundane field' . . . as opposed to a matter 'of state.' 733 F.2d at 926; App. A at 4a." (Petition at 9.) However, this allegedly "blatant distortion of the classic test" (Petition at 9) articulated in *Gravel v. United States*, 408 U.S. 606 (1972) is nowhere to be found in the opinion of the Court of Appeals.

That Court understood, and correctly applied, the *Gravel* test when it stated that "[a]ctivities 'casually or incidently related to legislative affairs,' *id.* at 558 [*United States v. Brewster*, 408 U.S. 501 (1972)], but not 'part and parcel of the legislative process,' *Gravel v. United States*, 408 U.S. at

626, are outside the realm of Speech or Debate protection.'"(733 F.2d 929; Pet. App. A at 10a.)

In applying the *Gravel* test to the alleged violative conduct of the petitioner, the Court of Appeals drew the logical and common sense conclusions that (1) restaurant management does not involve any "functions relating to the process of lawmaking . . . "or" "'other matters' of state 'which the Constitution places within the jurisdiction of either House.' *Gravel v. United States*, 408 U.S. 606, 625 (1972);" and (2) "Selecting, supervising, and discharging a food facilities manager . . . is not reasonably described as work that significantly informs or influences the shaping of our nation's laws." (733 F.2d 926, 931; Pet. App. A. at 4a and 14a.) Accordingly, neither the decision nor the rationale of the Court of Appeals in any way conflicts with the decisions of this Court.

C. The Court of Appeals Did Not Decide Any Important Question Regarding Official Immunity Which Should Be Decided By This Court.

Petitioners assert that "this Court has not resolved the degree of official immunity—absolute[5] or qualified—concerning the dismissal of a Congressional aide." (Petition at 13.) This question was not considered by the Court of Appeals because that Court found as "far-fetched" the notion that Anne W. Walker was a Congressional aide, ranking aide, or *alter ego* of the Subcommittee. (733 F.2d 931; Pet. App. A at 13a–14a.) Accordingly, further consideration of this question is not warranted.

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[5]This Court has held that the doctrine of "absolute immunity" is coextensive with the Speech or Debate Clause as it applies to Members of Congress and their aides. *Harlow v. Fitzgerald*, 457 U.S. at 810–811; *Davis v. Passman*, 442 U.S. at 228.

Petitioners contend that the Court of Appeals erred in focusing its analysis of the qualified immunity criteria set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), on their alleged violative acts, rather than on Speech or Debate Clause bar to remedies for these acts; and, that so long as there is uncertainty as to whether the courts have jurisdiction governing Congressional personnel decisions, members of Congress and their aides must act at their peril (Petition at 14–15).

This Court has already held that "judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause . . . " *Davis v. Passman*, 442 U.S. at 235 n.11. It is clear from its opinion (733 F.2d 932, 933; Pet. App. A at 17a–18a) that the Court of Appeals properly applied the qualified immunity criteria of *Harlow v. Fitzgerald*.

As Chief Justice Burger stated in his dissent in *United States v. Brewster*, 408 U.S. at 507: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process."

The integrity of the legislative process was not impinged by Anne W. Walker's operation and management of the House Restaurant System, or by her hiring, supervision, or firing.

The recurrent theme of petitioners' case is that, in discharging Anne W. Walker as General Manager of the House Restaurant System, they can violate her Constitutional rights with impunity because they are protected by the Speech or Debate Clause. But, "[n]o man [person] in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."

United States v. Lee, 106 U.S. 196, 200 (1882), quoted with approval in *Davis v. Passman*, 442 U.S. at 246. Yet, the petitioners would have the Supreme Court condone their allegedly flagrant, unlawful firing of Anne W. Walker. "All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Id.*, 442 U.S. at 246. But the petitioners would have the Supreme Court place them above Anne W. Walker's Constitutional rights.

There is no moral, ethical, legal, or other good and sufficient reason why the petitioners should not be held responsible for violating Anne W. Walkers' clearly established Constitutional rights of which they knew or should have known.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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